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A LEGAL WAR ON TERRORISM: EXTENDING *NEW YORK V. QUARLES* AND THE DEPARTURE FROM ENEMY COMBATANT DESIGNATIONS

INTRODUCTION

During turbulent times, the United States government has difficulty balancing rights fundamental to all Americans—the rights to life, liberty, and the pursuit of happiness.¹ This Comment examines our government's inveterate struggle to preserve its citizens' right to "liberty" while simultaneously protecting their right to "life." Adequately balancing these considerations has proved difficult time and time again. "When conditions are especially turbulent and the general populace perceives a threat to its way of life, the chances of a miscarriage of justice are substantially increased."²

The storybook of American history is blotched with several instances of governmental overreaction during uncertain times. Hind-sight bias incessantly leads the legal community to utter the same sorrowful words: "If we knew then what we know now." By that point, however, it is usually too late. Evidence of our government's chronic inability to provide its citizens with concurrent protection of life and liberty during unstable times begins at our nation's founding. While America's naissance was assumedly motivated by principles of sovereignty and equality,³ our forefathers allowed for the continued importation of individuals for the purpose of slavery.⁴ The prohibition placed on Congress against banning slavery,⁵ conduct defined by its restriction on individual liberty, was directly in conflict with the

1. "We hold these truths to be self-evident that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776).

2. Stephan Landsman, *When Justice Fails*, 84 MICH. L. REV. 824, 834 (1986) (book review).

3. "All men are created equal." *THE DECLARATION OF INDEPENDENCE* para. 2.

4. The United States Constitution provides, "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight." U.S. CONST. art. I, § 9, cl. 1.

5. In essence, the constitutional prohibition placed on Congress was aimed directly at the importation of slaves. A great deal of debate existed throughout the revolutionary era (as well as today) as to whether the Constitution restricted federal legislation against the institution of slavery as a whole. For a more in-depth discussion about the revolutionary debate over the issue of slavery, see JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION*, ch. 3 (Vintage Books 2002) (2000).

values of the newly established American republic.⁶ This contradiction between American ideology and behavior can be attributed to the instability of the newly formed American government.⁷ America gained freedom from England only fourteen years earlier. Several states south of the Potomac threatened not to ratify the Constitution if it prohibited slavery.⁸ When later faced with a request to interpret the Constitution as allowing for the prohibition of slavery, Congress chose silence, setting the issue aside for later assessment.⁹ The government found it beneficial for America's future not to immediately abolish the institution of slavery.¹⁰ This lack of decisive action at our nation's founding resulted in several decades of continued oppression that ultimately ended in a gruesome civil war.¹¹

A second unfortunate government overreaction in the wake of an unstable domestic environment occurred on December 18, 1944, when the United States Supreme Court upheld a military order permitting discrimination against individuals of Japanese descent.¹² In reaction to the Japanese attack on Pearl Harbor and America's subsequent declaration of war on Japan, the executive branch implemented several military orders and proclamations that limited the rights of Japa-

6. The American Revolution was fought in pursuit of freedom from the coercive shackles placed on the colonies by the British government. The colonies' final declaration of independence "clearly announced that it was 'not possible that one man should have property . . . in another.'" *Id.* at 86 (quoting FIRST CONGRESS, vol. 12, 298-99, 305-06). However, the 1790 census of the United States accounted for over 690,000 individuals whose liberty was completely restricted. *Id.* at 102.

7. The Constitutional Convention, accredited for solidifying the American union, took place only three years earlier. While the American colonies were unified in their objection to British control, a great deal of conflict existed between them concerning highly sensitive issues. Topping this list were the amount of power to be vested within a federal government, the geographical placement of a permanent American capital, and the continuance of slavery. Of these, the most heated debate existed between state delegations dependent on slavery and those delegations that were not. The drafters of the Constitution, in order to prevent the demise of a newly formed republic, chose evasiveness as a temporary solution to this problem. *See generally* ELLIS, *supra* note 5, at 81-118.

8. *See generally* ELLIS, *supra* note 5, at 81-118.

9. On February 11, 1790, two Quaker delegations from New York and Philadelphia presented petitions to the House calling for an immediate end to the African slave trade. *Id.* at 81. The following day, another petition arrived from the Pennsylvania Abolition Society demanding an end not only to slave trade, but to slavery as a whole. *Id.* at 83.

10. *Id.*

11. The American Civil War claimed the lives of over 600,000 individuals and caused social repercussions that still exist after more than 100 years. ELLIS, *supra* note 5, at 88.

12. *Korematsu v. United States*, 323 U.S. 214 (1944). Toyosaburo Korematsu was convicted of violating an order that precluded him from entering San Leandro, California—the city in which he lived—simply because of his Japanese descent. The order, Civilian Exclusion Order No. 34 of the Commanding General of the Western Command, U.S. Army stated, "[A]fter May 9, 1942, all persons of Japanese ancestry should be excluded from [San Leandro, California]." *Id.* at 215-16.

nese-American citizens.¹³ The government defended the exclusionary order, claiming it was necessary due to “the presence of an unascertained number of disloyal members of the [Japanese population], most of whom . . . no doubt were loyal to this country.”¹⁴ Military authorities found it impossible to segregate only the disloyal members from the group, which the Supreme Court subsequently determined was an acceptable rationale for the segregation of all Japanese individuals from the rest of the population.¹⁵ The Court, while “not unmindful of the hardships imposed . . . upon a large group of American citizens,”¹⁶ found that conditions of modern warfare sufficiently justified the security measures taken by the American military.¹⁷ In distinguishing between general unequal treatment of one race and the current endorsement of racial segregation by the military, the Court said, “[p]ressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.”¹⁸ The wartime internment of Japanese-Americans has been described as “one of America’s grossest violations of civil liberties, forcing an entire race to labor under a collective presumption of guilt.”¹⁹

Arguably, no recent chapter in our nation’s history caused more turbulence to the American status quo than the attacks of September 11, 2001.²⁰ These acts of international terrorism took place on America’s soil, causing a level of insecurity among our countrymen not felt since the duck and cover days of the Cold War. As a result, our government is taking several steps to re-establish our national “security.”²¹ One feature of this governmental action is the labeling of

13. *Id.* at 216. These orders and proclamations were substantially based upon an Executive Order, which stated in part, “the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities.” *Id.* at 217 (quoting Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942)) (internal quotation marks omitted).

14. *Id.* at 218-19.

15. *Id.* at 219.

16. *Korematsu*, 323 U.S. at 219.

17. *Id.* at 223-24.

18. *Id.* at 216.

19. Carl Takei, *A Lesson of Injustice From 1942*, BOSTON GLOBE, Feb. 18, 2003, at A11.

20. At 8:45 a.m. (EDT) on September 11, 2001, American Airlines Flight 11, flying out of Boston, Massachusetts, was hijacked and crashed into the North Tower of the World Trade Center. Carrie L. Groskopf, Note, *If It Ain’t Broke, Don’t Fix It: The Supreme Court’s Unnecessary Departure From Precedent in Kylo v. United States*, 52 DEPAUL L. REV. 201 (2002). At 9:03 a.m. (EDT), United Airlines Flight 175, also hijacked, flew into the South Tower. *Id.* Within an hour, American Airlines Flight 77 crashed into the Pentagon and United Airlines Flight 93 crashed into a field in Somerset County, Pennsylvania. *Id.* at 201-02.

21. See *infra* notes 128-140 and accompanying text.

suspected terrorists as "enemy combatants."²² The enemy combatant designation is a tool used by the federal government in times of war²³ to circumvent limitations placed upon it by the Constitution when interrogating suspected terrorists.²⁴ This Comment explores the enemy combatant designation and attempts to determine what rights an American citizen²⁵ suspected of terrorism should be afforded, as compared to rights traditionally given an accused criminal or prisoner of war.²⁶

22. Neal R. Sonnett, et al., ABA Task Force on Treatment of Enemy Combatants, Preliminary Report (Aug. 8, 2002) available at http://www.abanet.org/leadership/enemy_combatants.pdf (last visited Aug. 4, 2003).

23. War exists when "a state of war has been declared or when activities involving the use of force rise to such a level that a state of war exists." Sonnett, et al., *supra* note 22, at 7, n.10. While al Qaeda is not technically a nation, the joint resolution passed by Congress on September 18, 2001, *infra* note 131 and accompanying text, combined with United States operations in Afghanistan, arguably justifies a conclusion that the United States is currently at war. *Id.*

24. President Bush made it clear in his November Order that "[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order . . . to be detained." See Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, November 13, 2001, 66 FR 57833, 2001 WL 1435652 (Pres.) [hereinafter November Order], par. 1(e). Further evidence of the government's motives for detaining enemy combatants is clear from court opinions declaring the detainment permissible: "Believing that Hamdi's detention is necessary for *intelligence gathering efforts*, the United States has determined that Hamdi should continue to be detained as an enemy combatant in accordance with the laws and customs of war." Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002) (emphasis added). "[Padilla] is being detained in order to interrogate him about the unlawful organization with which he is said to be affiliated and with which the military is in active combat, and to prevent him from becoming reaffiliated with that organization." Padilla *ex rel* Newman v. Bush, 233 F. Supp. 2d 564, 588 n.9 (S.D.N.Y. 2002). The government's reasoning for this detainment begs the question: "Is [detaining enemy combatants] an appropriate response to a serious security threat or a ploy to circumvent the U.S. Constitution?" Kenneth Roth, *Foreign Enemies and Constitutional Rights*, CHI. TRIB., Nov. 10, 2002, at 11.

25. While considerable attention should be given to the legality of the government's detainment of foreign nationals in immigration proceedings, as well as to the use of the enemy combatant designation on foreign nationals currently held at Guantanamo Bay, this Comment is limited to a discussion of American citizens.

26. The third Geneva Convention defined "prisoner of war" as a person who has fallen into the power of the enemy and can be included in one of the following six categories: (1) member or volunteer "of the armed forces of a Party to the conflict"; (2) member of "other militias and . . . other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory . . . provided that such militias" are "commanded by a person responsible for his subordinates," have a "*fixed distinctive sign recognizable at a distance*," carry "arms openly," or "[conduct] their operations in accordance with the laws and customs of war"; (3) member of "regular armed forces who professes allegiance to a government or an authority not recognized by the Detaining Power"; (4) person who "accompan[ies] the armed forces without actually being members thereof"; (5) member of a crew for "the merchant marine and . . . civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law"; and (6) inhabitants "of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular

The recent use of enemy combatant designations by the administration of President George Walker Bush is quite unusual, primarily because the label has lain dormant for over five decades.²⁷ This sudden revival of an only partially developed government instrument might potentially damage the legitimacy of the Bush Administration by arbitrarily eliminating several predetermined American principles. At the crux of the matter resides Fifth Amendment protections, separation of powers, and judicial review.²⁸

This Comment analyzes the enemy combatant designation placed on American citizens by the American government, both past and present. Part II briefly reviews Supreme Court case law attempting to establish the boundaries of enemy combatant jurisprudence.²⁹ It further discusses the Bush Administration's current use of enemy combatant designations against individuals suspected of terrorism.³⁰ Part III presents consequences of the current enemy combatant designations.³¹ It highlights the effects of President Bush's orders on individuals suspected of terrorism,³² evaluates the actions taken by the Bush Administration,³³ and sets forth a feasible alternative to the use of enemy combatant designations when dealing with America's "war on terrorism."³⁴ Specifically, subpart D of Part III suggests an expansion of the public safety exception set forth in *New York v. Quarles*.³⁵ Part IV suggests how the government's decisions in dealing with terrorist threats will impact the legitimacy of the Bush Administration.³⁶ In conclusion, Part V stresses the immediate need for the Bush Administration to reassess its current methods.

II. BACKGROUND

Several consequences emerge when the United States government labels a criminal suspect an "enemy combatant." For instance, the label requires a trial before a military commission, which denies several

armed units, provided they carry arms openly and respect the laws and customs of war." Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 (Geneva Convention III).

27. The most recent case dealing directly with the constitutionality of the enemy combatant designation is *Ex parte Quirin*, 317 U.S. 1 (1942). See *infra* notes 77-122 and accompanying text.

28. See *infra* notes 164-262 and accompanying text.

29. See *infra* notes 41-127 and accompanying text.

30. See *infra* notes 128-140 and accompanying text.

31. See *infra* notes 148-163 and accompanying text.

32. See *infra* notes 164-238 and accompanying text.

33. See *infra* notes 239-260 and accompanying text.

34. See *infra* notes 261-299 and accompanying text.

35. See *infra* notes 261-299 and accompanying text.

36. See *infra* notes 302-314 and accompanying text.

individual rights typically afforded to prisoners of war and criminals tried in civilian courts.³⁷ Consequently, a comprehensive understanding of the method used to determine who falls under this label is critical. Over the past two and a half centuries of American jurisprudence, courts have provided nominal assistance in defining conduct worthy of rescinding a wartime enemy's constitutional rights.³⁸ This section presents the constitutional analysis undertaken by the judiciary in determining the legality of the enemy combatant designation and its consequences.³⁹ Additionally, this section describes the current use of enemy combatant designations by the United States government.⁴⁰

A. *Enemy Combatant Jurisprudence: A "Short" Walk Through Time*

Well rooted in our nation's history is the notion that an individual can act so defiantly that he loses certain civil rights.⁴¹ This restriction on individual rights occurs most often during times of war.⁴² The government gave individuals in violation of the law of war⁴³ fewer rights prior to the adoption of the Constitution and during the Civil War.⁴⁴ Nonetheless, actual cases dealing with enemy combatants are few in number. This section summarizes case law relevant to determining the definition of an enemy combatant and the constitutional implications behind the label.

37. See *infra* notes 148-162 and accompanying text.

38. See *infra* notes 43-124 and accompanying text.

39. See *infra* notes 43-124 and accompanying text.

40. See *infra* notes 128-140 and accompanying text.

41. See *infra* notes 44, 116-117.

42. The governmental restriction on individual rights in the context of enemy combatant designations is completed by subjecting these individuals to trial before military tribunals. See *infra* note 44.

43. The Supreme Court relied on international law when forming its definition of the "law of war," which it described as "that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals." *Ex parte Quirin*, 317 U.S. 1, 27-28 (1942).

44. The *Quirin* Court highlights numerous instances during the Civil War where military commissions were created for the trial of Confederate enemies in 1865. See *Quirin*, 317 U.S. at 13 n.10. These instances include the cases of T.E. Hogg (charging defendant with coming aboard a United States merchant steamer in the guise of a peaceful passenger while being commissioned by the Confederate Government for the purpose of capturing the vessel and converting her to a Confederate cruiser); John Beall (charging defendant with coming aboard a military vessel in civilian dress and attempting to derail a train while in disguise); and Robert Kennedy (charging defendant with attempting to set fire to the city of New York, while in disguise). *Id.* Each of these individuals was charged with being a spy in violation of the laws of war and sentenced to be hanged. *Id.*

1. *Lincoln Responds to a Confederate Uprising: The Military Tribunal*

The Civil War is perhaps the most gruesome illustration of a nation torn apart by its incompatible beliefs only to grow stronger subsequent to the bloodshed. During the war, however, the threat of permanent succession appeared more probable than the eventual evolution of America into an international superpower. As the battles dragged on, civilian war protesters plagued Union territories, recruiting men for the Confederate army.⁴⁵ On April 27, 1861, President Abraham Lincoln declared that any individual who discouraged enlistment in the Union army or “engaged in disloyal practices would be subject to trial in a military commission, regardless of whether they were civilians or military.”⁴⁶ In addition to prosecuting these individuals before a military commission, Lincoln suspended each individual’s right to remove his case to a civilian court or file a writ of habeas corpus.⁴⁷ While the following two cases do not directly discuss the issue of enemy combatant designations, they are essential to a full understanding of the current enemy combatant dilemma. Lincoln’s reaction to civil disruption and the cases it generated, laid a foundation for the trial of *civilians* by military commissions.

a. *Ex parte Merryman*⁴⁸

As a result of Lincoln’s proclamation, John Merryman was arrested on May 25, 1861 for the destruction of railroad bridges in Baltimore, Maryland.⁴⁹ While Merryman was detained in Fort McHenry, his attorney filed a writ of habeas corpus with General George Cadwalader, challenging the lawfulness of Merryman’s detainment.⁵⁰ Chief Justice Roger B. Taney issued the writ, ordering the military to “bring Merryman before the circuit court in Baltimore.”⁵¹ Cadwalader refused to release Merryman, thereby failing to comply with Taney’s orders.⁵²

45. Anne English French, *Trials in Times of War: Do the Bush Military Commissions Sacrifice Our Freedoms?*, 63 OHIO ST. L.J. 1225, 1228-29 (2002).

46. *Id.* at 1229.

47. *Id.*

48. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).

49. See French, *supra* note 45, at 1229 n.17.

50. See *id.* at 1229. General Cadwalader was the commander of Fort McHenry, where Merryman was being held. *Id.*

51. See *id.*

52. See *id.* Taney ordered Cadwalader to appear before him in Baltimore with Merryman for a hearing on May 27, 1861. *Id.* Upon Cadwalader’s noncompliance, Taney ordered him to appear the following day, which Cadwalader also refused. French, *supra* note 45, at 1229.

He used President Lincoln's suspension of the writ of habeas corpus to justify his noncompliance.⁵³

Chief Justice Taney, writing for the United States Supreme Court, declared Lincoln's suspension of the writ of habeas corpus unconstitutional.⁵⁴ Taney, looking to the Constitution, emphasized the structure of American government as one of "delegated and limited power."⁵⁵ He argued that the President could not suspend the writ of habeas corpus, a power reserved for the legislative branch even in times of war.⁵⁶ In addition, Taney argued that Merryman's status as a civilian from Indiana precluded the military from exercising judicial authority over him.⁵⁷ Consequently, Lincoln released Merryman.⁵⁸

Neither Taney's decision nor Merryman's subsequent release deterred President Lincoln from enforcing a suspension of the habeas corpus privilege and the trial of civilians before military tribunals.⁵⁹ On July 4, 1861, Lincoln requested Congress's endorsement of his prior conduct.⁶⁰ Lincoln argued that because Congress was not in session when the need to suspend habeas corpus arose, he was forced to "act on his own to protect the nation."⁶¹ On August 6, 1861, in response to the President's request, Congress "retroactively approved 'all the acts, proclamations, and orders of the President . . . respecting the army and navy of the United States.'"⁶² In addition, Congress passed the Habeas Corpus Act on March 3, 1863, which provided the President authority to suspend habeas corpus whenever he determined public safety required it.⁶³

53. *See id.* at 1229.

54. *See id.* at 1230. Taney declared that "(1) only Congress has the right to suspend the privilege of habeas corpus; and (2) the President exceeded his war powers." *Id.* (citing DONALD P. KOMMERS & JOHN E. FINN, *AMERICAN CONSTITUTIONAL LAW: ESSAYS, CASES, AND COMPARATIVE NOTES* 291 (1988)).

55. *Id.*

56. *Id.* While the Constitution does not expressly state who has the authority to suspend habeas corpus, Taney argued that placement of the provision (art. I, § 9, cl. 2) within Article I assumed only a congressional act could authorize a suspension. *See French, supra* note 45, at 1230.

57. *See French, supra* note 45, at 1231. Taney asserted that the military had no right to arrest and detain an individual, unless he was subject to the rules and articles of war, for an offense against the laws of the United States. *Id.* at 1230. If a military officer arrested such an individual, he was to turn him over to a civilian court. *Id.*

58. *Id.*

59. *Id.*

60. *See French, supra* note 45, at 1230.

61. *Id.* at 1231.

62. *Id.* at 1232 (quoting PAUL BREST ET AL., *PROCESS OF CONSTITUTIONAL DECISION MAKING: CASES AND MATERIALS* 222 (4th ed. 2000)).

63. *Id.*

b. *Ex parte Milligan*⁶⁴

It was not until after Lincoln's death and the conclusion of the Civil War that the Supreme Court was able to address the constitutionality of Lincoln's military commissions and suspension of habeas corpus.⁶⁵ In *Ex parte Milligan*, the Supreme Court addressed both issues. Lamdin Milligan was arrested in Indiana and tried before a military commission for "conspiring against the United States by planning to seize weapons, free Confederate prisoners, and kidnap the governor of Indiana."⁶⁶ Milligan filed a habeas corpus petition "challenging the jurisdiction of the military commission to try him."⁶⁷ In *Milligan*, the Court first stated, "despite Congress's ratification of Lincoln's military order suspending habeas corpus, the federal courts had jurisdiction to hear a writ of habeas corpus to determine the validity of the military commission's jurisdiction."⁶⁸

The Court next addressed whether the government could create military commissions for the trial of civilians accused of committing civil crimes because they posed an "immediate danger to the country."⁶⁹ Justice David Davis, writing for the majority, recognized that during emergencies, the government needs the ability to detain persons threatening the country's safety.⁷⁰ Nevertheless, the Court reaffirmed *Merryman*, stating that emergency and war do not justify the military trial of a civilian if federal civil courts are open to hear the criminal accusations.⁷¹ Moreover, the Court noted that "times of war are times when the Court is most compelled to protect constitutional civil liberties."⁷² The Court ultimately allowed for the trial of civilians by military commission, but limited the ruling's scope.⁷³ *Milligan* gave military commissions jurisdiction over a *civilian accused of committing a civil crime*⁷⁴ when civil courts were closed.⁷⁵ It was not until the

64. 71 U.S. (4 Wall.) 2 (1866).

65. *Id.* at 2.

66. *Padilla v. Bush*, 233 F. Supp. 2d 564, 593.

67. French, *supra* note 45, at 1231.

68. *Id.* at 1232. "Consequently, the Supreme Court could review whether a military commission had jurisdiction over Milligan." *Id.*

69. *Id.* at 1233.

70. *Id.*

71. *Id.* The Court determined that the military trial of civilians would only be appropriate if the civil courts were closed. See French, *supra* note 45, at 1233. The Habeas Corpus Act of 1863 expressly stated that "as long as civil courts were open, the military was required to cede jurisdiction over civilians whom it had arrested to the civil courts." *Id.* (citing *Milligan*, 71 U.S. (4 Wall.) at 131).

72. French, *supra* note 45, at 1234.

73. *Ex parte Quirin*, 317 U.S. 1, 37 (1942).

74. French, *supra* note 45, at 1234 (citing *Milligan* 71 U.S. (4 Wall.) at 121-22).

75. *Id.*

Second World War that the Court would consider the authority of a military commission to hear cases involving enemy combatants.⁷⁶

2. *Roosevelt's Reaction to Nazi Saboteurs: Ex parte Quirin*⁷⁷

In *Ex Parte Quirin*, the United States Supreme Court discussed at length the detainment and trial of enemy combatants by a military commission.⁷⁸ Ultimately, the Court set forth a definition of enemy combatant⁷⁹ that focused on the element of deceit relied upon by earlier military commissions.⁸⁰

a. The Facts of *Quirin*

Quirin arose amid World War II, when seven German-born individuals living in the United States returned to Germany between 1933 and 1941⁸¹ for training in explosives and secret writing at a sabotage school outside of Berlin.⁸² All but one of these individuals admitted citizenship to the German Reich.⁸³ An officer of the High German Command gave each individual orders to destroy United States war industries and facilities.⁸⁴ After they received their instructions, all seven men returned to varied locations within the United States,⁸⁵ armed with explosives, fuses, and incendiary timing devices.⁸⁶ All individuals wore articles of clothing bearing the symbol of the German Reich, which they removed and buried upon arrival to the United

76. See *infra* notes 77-124 and accompanying text.

77. 317 U.S. 1 (1942).

78. *Id.*

79. The *Quirin* Court makes frequent use of the term "enemy belligerent." The terms "enemy belligerent," "unlawful combatant," and "enemy combatant" describe the same group of individuals. Even though the *Quirin* Court never used the term "enemy combatant," the term could be used interchangeably with those actually used.

80. See *supra* note 44.

81. *Quirin*, 317 U.S. at 20. These individuals include Richard Quirin, Herbert Hans Haupt, Edward John Kerling, Ernest Peter Burger, Heinrich Harm Heinck, Werner Thiel, and Herman Otto Neubauer. *Id.* at 7.

82. *Id.*

83. *Id.* Herbert Haupt came to America when he was five years old and became a citizen of the United States "by virtue of the naturalization of his parents during his minority." *Id.*

84. *Id.* at 8. Either these individuals or their relatives were to receive salary payments upon completion of their objectives. *Quirin*, 317 U.S. at 8.

85. *Id.* It is understood that Burger, Heinck, and Quirin, with a German citizen named Dasch, arrived along the coast of Amagansett Beach in Long Island, New York in a German submarine during the evening of June 30, 1942. Kerling, Thiel, Neubauer, and Haupt arrived on the coast of Ponte Vedra Beach, Florida, on June 17, 1942, and thereafter went to several locations throughout the United States. *Id.*

86. *Id.*

States.⁸⁷ Soon thereafter, agents of the Federal Bureau of Investigation took all of the men into custody in Chicago and New York.⁸⁸

Subsequent to the individuals' detainment, President Franklin D. Roosevelt appointed a military commission to try the accused for offenses against the law of war and the Articles of War.⁸⁹ The appointed commission was formed pursuant to the Order of July 2, 1942 (July Order).⁹⁰ The July Order stated in clear terms that any individual subject to it was denied access to any other court.⁹¹ The individuals were subsequently turned over to Provost Marshal Albert Cox, of the Military District of Washington, to be held for trial before the Commission.⁹²

On July 2, 1942, the American government charged the German men with violations of the law of war,⁹³ Articles 81⁹⁴ and 82⁹⁵ of the Articles of War, and conspiracy to commit each offense.⁹⁶ The men petitioned for leave to file a writ of habeas corpus, which the district court denied.⁹⁷ The United States Court of Appeals for the District of Columbia affirmed the lower court's denial.⁹⁸ The men then petitioned the Supreme Court, which granted *certiorari*.⁹⁹

87. *Id.* Some individuals wore parts of German Marine Infantry uniforms, while others wore caps. *Id.* It appears from this behavior that these men were familiar with the rules of law. Had the men been captured immediately upon their arrival and not been wearing their uniforms, they would have been in violation of the laws of war. For this reason, it appears that the men remained in military clothing until after their risky arrival upon American soil was complete.

88. *Quirin*, 317 U.S. at 8.

89. *Id.*

90. *Id.* This Order not only directed the commission to try the individuals, but it also set up regulations for the procedure of the trial and for review of the record of the trial and any judgment of the commission. *Id.* It said in pertinent part:

All persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States . . . through coastal or boundary defenses, and are charged with committing or attempting to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals.

Id.

91. *Id.*

92. *Quirin*, 317 U.S. at 8.

93. *Id.*

94. *Id.* See 82nd Articles of War, 10 U.S.C. § 1471-1593 (1946) (repealed 1950) Article 81 (defining the offense of relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy).

95. *Quirin*, 317 U.S. at 8. See 82nd Articles of War, *supra* note 94, Article 82 (defining the offense of spying).

96. *Quirin*, 317 U.S. at 8.

97. *Id.* at 9.

98. *Id.*

99. *Id.* The Supreme Court, citing *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), determined it had jurisdiction to hear the writ because the denial by the district court allowed for leave to file

b. Roosevelt's Authority for the Establishment of Military Commissions

The Supreme Court set out to determine whether the Constitution, or other laws of the United States, forbade the trial of petitioners before a military commission. The petitioners contended that the President had neither statutory nor constitutional authority to order a trial by military tribunal for the offenses with which they were charged; therefore, they were entitled to a trial in civilian courts under the protection of the United States Constitution.¹⁰⁰ In the alternative, the petitioners argued that the July Order conflicted with several provisions of the Articles of War adopted by Congress.¹⁰¹ The Government, in response to petitioners' contentions, argued that the petitioners should be denied access to the civil courts of the United States because they entered American territory as enemy belligerents, conduct for which the Articles of War authorized the President to create military commissions.¹⁰²

The Court reviewed the constitutional powers bestowed upon Congress and the President, paying close attention to Congress's ability to make any law necessary and proper to provide for the common defense.¹⁰³ The Court explained that the drafters intended this power to aid Congress in effectively upholding a core objective of the Constitution—to provide for the common defense.¹⁰⁴ The Court further dis-

the habeas corpus petition. This constituted a judicial determination of a case or controversy, which is thereby reviewable on appeal to the court of appeals and therefore reviewable to the Supreme Court by certiorari. *Id.* In addition, the Court stated, "neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission." *Id.* at 25.

100. *Quirin*, 317 U.S. at 25. In particular, the petitioners asserted their right to a trial by jury, guaranteed by the Fifth and Sixth Amendments, to all persons charged in civilian courts with criminal offenses. *Id.*

101. *Id.* The provisions alleged to be in conflict with Roosevelt's July Order included Articles 38, 43, 46, 50 1/2 and 70. *Id.*

102. *Id.* The government urged the petitioners' character and conduct was identical to that which the President's proclamation described as limited to trial before a military commission. *Id.* The Government therefore contended that if the petitioners were found to be enemy belligerents and the President's proclamation was enforceable, the petitioners should be denied access to such courts. *Quirin*, 317 U.S. at 25.

103. *Id.* at 26. Article I, Section 8, clause 18 of the Constitution, states in full that Congress has the power to "make all Laws which shall be *necessary and proper* for the carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." (emphasis added). Of the foregoing powers referred to by this clause is Article I, Section 8, clause 1 of the Constitution, which gives Congress the power to "provide for the common Defense." *Id.* By inference, Congress is given the power to make any necessary and proper law to provide for this common defense.

104. *Id.*

cussed the duties of the President as "carrying into effect all laws passed by Congress for the conduct of war . . . and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war."¹⁰⁵

The Articles of War,¹⁰⁶ implemented by Congress, provided for trial and punishment of Army personnel and specified individuals associated with the Army by court martial.¹⁰⁷ Furthermore, the Court found the Articles of War recognized military commissions, appointed by military command, as an appropriate forum for the trial of offenses against the law of war not ordinarily tried by courts martial.¹⁰⁸ The President, with certain limitations, had the power to determine and implement the procedure for trial before such military commissions.¹⁰⁹ The Court found that the sanctioning of jurisdiction onto military tribunals for offenses against the law of war was an appropriate exercise of Congress's constitutionally limited authority to define and punish such offenses.¹¹⁰ It also found Roosevelt's order creating the commission was an appropriate exercise of his authority.¹¹¹

c. Unlawful Belligerent Defined: The Jurisdictional Scope of Military Commissions

Once the Court determined that Roosevelt had authority to establish military commissions, it considered their permissible jurisdictional scope.¹¹² The Court set out to determine who these commissions could try and who they could not¹¹³ by acknowledging an appropriate difference in treatment between captured lawful and unlawful com-

105. *Id.* (citing U.S. CONST. art. II, §1, cl. 1).

106. See 82nd Articles of War, *supra* note 94, 10 U.S.C. §§ 1471-1593 (1946) (repealed 1950).

107. *Quirin*, 317 U.S. at 27 (citing Articles 1 and 2 of the 82nd Articles of War).

108. *Id.* The Court cited 10 U.S.C. § 1483 (Article 12) and 10 U.S.C. § 1486 (Article 15). Article 15 allows for concurrent jurisdiction of courts martial, military commissions, and all other military tribunals of "offenders or offenses that by statute or by the law of war may be triable by such military commissions." *Id.* Article 12 provides that jurisdiction is not limited to military personnel, but includes "any . . . person who by the law of war is subject to trial by military tribunals . . ." *Id.* The Court also said that it was not necessary for Congress to have listed the exact offenders or offenses subject to trial by military commissions because Congress incorporated all offenses by reference to the laws of war. *Id.* at 30.

109. *Id.* at 28 (citing Articles 38 and 46 of the 82nd Articles of War).

110. *Quirin*, 317 U.S. at 28.

111. *Id.*

112. See French, *supra* note 45, at 1240.

113. See *Quirin*, 317 U.S. at 29-30.

batants.¹¹⁴ The Court distinguished between the lawful and unlawful combatants as follows:

The spy who secretly and *without uniform* passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who *without uniform* comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.¹¹⁵

The Court noted a distinction in the treatment of enemies as early as the Civil War.¹¹⁶ It further distinguished belligerents on the basis of identification in the 1940 Rules of Land Warfare promulgated for the guidance of the Army by the War Department.¹¹⁷ These findings led the Court to interpret Article 15 of the Articles of War as Congress's express provision permitting the trial and punishment of unlawful belligerents.¹¹⁸

d. The Court's Ruling

In concluding that military commissions had jurisdiction over the petitioners, the Court focused on their conduct. The Court emphasized the fact that the petitioners discarded all identifying clothing upon their entrance into the United States, while acting for a belligerent enemy nation.¹¹⁹ In response to petitioners' constitutional claims,

114. *Id.* A lawful combatant is subject to capture and detention as a prisoner of war, whereas the unlawful combatant is subject to capture and detention, but is subject to trial and punishment by military tribunals. *Id.* at 31.

115. *Id.* (emphasis added).

116. *Id.* The Court pointed to General Order No. 100, para. 83 (Apr. 24, 1863), which directed, "Scouts or single soldiers, if disguised in the dress of the country, or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor, are treated as spies, and suffer death," and para. 84, which stated, "Armed Prowlers, by whatever names they be called . . . are not entitled to the privileges of the prisoner of war." *Id.* at 32-33.

117. *Quirin*, 317 U.S. at 32-33. Paragraph 9 of the Rules names the carrying of open arms and a fixed distinctive emblem as distinguishing characteristics of lawful belligerents. *Id.* Paragraph 348 states that "persons who take up arms and commit hostilities without having the means of identification prescribed for belligerents are punishable as 'war criminals.'" Furthermore, the definition in paragraph nine of lawful belligerent was adopted by Article 1, Annex to Hague Convention No. IV of October 18, 1907, to which the United States was a signatory.

118. *Id.*

119. *Id.* at 37. The Court described any action aimed at the destruction of any property used or useful in prosecuting war as war-like, thereby broadening the commission of punishable conduct beyond action aimed at the Armed Forces of the United States. *Id.* The Court further identified the petitioners' entrance into the United States as a hostile war-like act in and of itself:

Nor are petitioners any the less belligerents if, as they argue, they have not actually committed or attempted to commit any act of depredation or entered the theatre or

the Court looked to the era in which the Constitution was adopted and found such rights unrecognized by military tribunals;¹²⁰ therefore, it determined such rights to be outside the protection of such provisions.¹²¹ The Court concluded that the petitioners' conduct constituted a violation of the law of war in such a manner as to make the petitioners unlawful belligerents, thus subjecting them to trial by a military tribunal without the protection of the Fifth and Sixth Amendments.¹²²

The Court also ruled, "citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war."¹²³ Thus, according to the Supreme Court in *Quirin*, both citizens and aliens are subject to military commissions when they violate the law of war.¹²⁴

Most importantly, the Court noted that Roosevelt's reliance on the Articles of War in his July Order confined the military commissions he

zone of active military operations The offense was complete when with that purpose they entered—or, having so entered, they remained upon—our territory in time of war without uniform or other appropriate means of identification.

Id. at 31.

120. *Quirin*, 317 U.S. at 31. The Court did not consider military tribunals "courts" as set forth in Article III, Section 2 of the Constitution. See *Williams v. United States*, 289 U.S. 553 (1933) (stating that Article III, Section 2, clause 1 of the Constitution, using the term "all" in some cases and omitting it in others, when enumerating cases where judicial power shall extend, cannot be regarded as accidental because every word in the Constitution must be given its due force and appropriate meaning). The Court interpreted the intention of the Framers of Article III, Section 2 of the Constitution as attempting to preserve the unimpaired right to a trial by jury existent in the common law, rather than including cases that were understood at the time not to include such a right. *Quirin* 317 U.S. at 39.

121. *Id.* at 40. The Court stated:

We must conclude that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by a jury at common law be tried only in the civil courts.

Id. at 40. Further support for the contemporary exclusion of military tribunals from the rights set forth in Article III, Section 2 of the Constitution is drawn from Section 2 of the Act of Congress of April 10, 1806, derived from the Resolution of the Continental Congress of August 21, 1776, which "imposed the death penalty on alien spies 'according to the law and usage of nations, by sentence of a general court martial.'" *Id.* at 41. The resolution of 1776 displays a willingness to subject non-military individuals to trial before a military commission without providing them with similar rights as individuals appearing in a civilian court.

122. *Id.* at 45. However, it is important to note that while some of the defendant's constitutional rights were precluded, they were allowed to confer with and retain attorneys. See French, *supra* note 45, at 1238.

123. *Quirin*, 317 U.S. at 37. The Court explained that "citizens who associate themselves with the military arm of the enemy government, and . . . enter this country bent of hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war." *Id.*

124. See French, *supra* note 45, at 1243.

created to the jurisdictional scope provided for within the Articles of War.¹²⁵ Specifically, the commissions only had jurisdiction over individuals whose conduct fit the "unlawful belligerent" definition.¹²⁶ Therefore, the jurisdiction was limited to the trial of spies who passed military lines *without uniform*.¹²⁷

*B. The Current Use of Enemy Combatant Designations:
Congress and the President Respond to al Qaeda*

The *Milligan* and *Quirin* Courts set forth narrow rules recognizing the ability of the President, with Congressional authorization, to create military commissions for the trial of individuals in limited circumstances.¹²⁸ In response to the treacherous acts of September 11, 2001, President Bush relied on Roosevelt's conduct¹²⁹ and the decision set forth in *Quirin* to assert his authority in establishing military commissions for the trial of suspected terrorists.¹³⁰ This section presents the legislative and executive responses to these recent attacks on America.

1. Public Law 107-40 (PL 107-40)

On September 18, 2001, the Senate and House of Representatives passed a joint resolution authorizing the use of military force against those responsible for the attacks of September 11.¹³¹ Congress's stated purpose was to protect United States citizens from further threats against America's national security.¹³² The resolution authorized President Bush to use "all necessary and appropriate force against

125. *Id.* at 1242.

126. *Id.* The Court noted the possibility that an individual might violate the law of war without becoming an unlawful belligerent, thereby entitling him to trial by courts martial or a civilian court. *Id.*

127. See *supra* note 115 and accompanying text.

128. See *supra* notes 74-77, 119-127 and accompanying text.

129. On November 19, 2001, Bush said, "I would remind those who don't understand the decision I made [to establish military commissions] that Franklin Roosevelt made the same decision in World War II. Those were extraordinary times as well." See French, *supra* note 45, at 1244 n.95.

130. *Id.* at 1243.

131. Pub. L. No. 107-40, Authorization for Use of Military Force (Sept. 18, 2001) [hereinafter PL 107-40].

132. *Id.* Congress founded its authority for passing this resolution on Article I, Section 8, clause 18 of the Constitution, stating, "Whereas, such acts render it both *necessary and appropriate* that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad Now, therefore, be it Resolved by the Senate and House of Representatives of the United States of America in Congress assembled." The Constitutional power relied upon by this 107th Congress closely echoes the rationale relied upon by the *Quirin* Court in acknowledging both the power of Congress and the President to provide for the common defense. See *supra* note 103.

those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001. . . in order to prevent future acts of international terrorism against the United States. . . ."¹³³

2. *Detention, Treatment of Certain Noncitizens in the War Against Terrorism*

On November 13, 2001, in reliance on PL 107-40, President Bush ordered the detention, treatment, and trial of several noncitizens suspected of having ties to terrorist nations or organizations (November Order).¹³⁴ The President rested his authority not only on PL 107-40, but also on the Constitution¹³⁵ and 10 U.S.C. §§ 821¹³⁶ and 836.¹³⁷

The November Order recognized the ability and intention of terrorist cells to attack the United States again.¹³⁸ In an effort to protect the United States and its citizens from further attacks, President Bush ordered all individuals subject to the November Order be detained and tried before military commissions.¹³⁹ In addition, President Bush denied the detainees the right to several general principles of law and rules of evidence recognized in civilian courts.¹⁴⁰

133. PL 107-40, *supra* note 131.

134. See Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, Order of November 13, 2001 by President George Walker Bush November Order. See *supra* note 24.

135. *Id.* Bush relied upon Article II, Section 1, clause 1 of the Constitution, the same clause on which the *Quirin* court premised Roosevelt's constitutional authority. See *supra* note 105.

136. *Id.* 10 U.S.C. § 821 (1956). (Jurisdiction of Courts-Martial Not Exclusive): This provision confers concurrent jurisdiction on military commissions, provost courts, courts martial, and all other military tribunals with respect to "offenders and offenses that by statute or by the law of war may be tried in military commissions, provost courts, or other military tribunals." It closely echoes Article 15 of the 82nd Articles of War which was relied on in *Quirin*. See *supra* note 108.

137. *Id.* 10 U.S.C. § 836 (President May Prescribe Rules). This provision authorizes the President to prescribe all pretrial, trial and post-trial procedures for cases triable by courts martial, military commissions and other military tribunals. The provision closely echoes Articles 38 and 46 of the 82nd Articles of War, which was relied on in *Quirin*. See *supra* note 109 and accompanying text.

138. *Id.* § 1(c). "Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks on the United States." *Id.*

139. *Id.* § 1(e). "[T]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order . . . to be detained, and . . . tried for violations of the laws of war and other applicable laws by military tribunals." *Id.*

140. *Id.* § 1(f). For a more complete list of the rights afforded individuals subject to the November 13 Order, see *infra* notes 148-161 and accompanying text.

III. ANALYSIS

President Bush's Military Order has sparked a great deal of criticism within the legal community.¹⁴¹ Many critics assert that Bush has overstepped his authority as Commander in Chief, thereby violating the fundamental doctrine of Separation of Powers.¹⁴² Others criticize his order as an "unconstitutional deprivation of fundamental liberties."¹⁴³ This section evaluates President Bush's current application of the enemy combatant designation and its consequences. Part A briefly discusses the consequences of being labeled as an enemy combatant today based on the Department of Defense Military Commission Order.¹⁴⁴ Part B contrasts the government's arrest and detainment of several suspected terrorists subsequent to September 11, 2001. Part C attempts to determine whether President Bush's actions were within his authority or a display of the most recent example of government overreaction to the threat of national security.¹⁴⁵

In addition to evaluating President Bush's use of the enemy combatant label, this section proposes that President Bush either commit himself to a constitutional definition of "enemy combatant" or find an alternative solution to protecting the public.¹⁴⁶ Part D suggests, as an alternative to the enemy combatant label, the Bush Administration prosecute all suspected terrorists in civilian courts and argue for an

141. See Stephen I. Vladeck, *A Small Problem of Precedent*, 18 U.S.C. § 4001(a) and the Detention of U.S. Citizen "Enemy Combatants," 112 YALE L.J. 961 (2003) (arguing President Bush's current policy of detaining enemy combatants violates 18 U.S.C. § 4001(a)); see also Rankin, *infra* note 142 and French, *supra* note 45.

142. See Vladeck, *supra* note 141 (concluding that the detainment of enemy combatants violates 18 U.S.C. § 4001(a) and results in a disregard of the doctrine of separation of powers); French, *supra* note 45, at 1227; and Bill Rankin, *Suspect's Detainment Scrutinized; GSU Students Told U.S. Prisoner's Designation Wrong*, ATLANTA J. & CONST., Nov. 16, 2002, at C.2 (quoting Jose Padilla's attorneys, who said "the designation of . . . Padilla as an 'enemy combatant' has more to do with testing the limits of presidential power than it does the detention of a would-be terrorist").

143. French, *supra* note 45, at 1227; see also Laurence H. Tribe, *Letter to the Editor, Military Tribunals: Too Broad a Power*, N.Y. TIMES, Dec. 7, 2001, at A30; Takei, *supra* note 19 (comparing the detainment of enemy combatants to improper detainment of Japanese-Americans during World War II); Jonathan Turley, *Ashcroft's Law West and East of the Pecos; He is Arbitrarily Deciding Who can be Tried Where*, L.A. TIMES, Nov. 13, 2002, at B13 (criticizing Ashcroft's arbitrary determination of who is subject to trial before a military commission); and *America's 'Enemy Combatants'*, ROANOKE TIMES & WORLD NEWS, Nov. 1, 2002, at A16 (saying that the enemy combatant designation of Yaser Hamdi "summarily stripped him of his rights, as an American, to legal representation and due process").

144. See *infra* notes 149-163 and accompanying text.

145. See *infra* notes 239-260 and accompanying text.

146. See *infra* notes 243-251, 271-298 and accompanying text.

extension of the “public safety exception” set forth in *New York v. Quarles*.¹⁴⁷

A. Current Consequences of the Enemy Combatant Designation

Today, when President Bush labels an individual an enemy combatant, a military commission is created to determine his guilt or innocence.¹⁴⁸ This individual no longer has a right to be tried before a civilian court with the full protection of the Constitution. Rather, an enemy combatant tried before a military commission is given rights as determined by the President and Department of Defense.¹⁴⁹

1. Restricted Right to Counsel

By order of the Department of Defense, military officers who are judge advocates of any United States armed force are assigned as defense counsel for an accused enemy combatant.¹⁵⁰ A defendant may select a military officer as his counsel or may elect to retain the services of a civilian attorney, provided the attorney meets the requirements set forth by the Commission Order.¹⁵¹ The hiring of civilian counsel, however, does not guarantee his or her presence at all points throughout the proceedings.¹⁵² The government rejected habeas petitions to allow individuals unfettered access to private counsel on the grounds that President Bush, as Commander in Chief, determined the accused to be enemy combatants.¹⁵³

147. See *infra* notes 289-298 and accompanying text.

148. See *infra* notes 288-298 and accompanying text. The *Quirin* Court acknowledged the power of the President as Commander-in-Chief to create commission through authority granted by Congress and the Constitution. See *supra* notes 103-105 and accompanying text.

149. Department of Defense, Military Commission Order No. 1 (Mar. 21, 2002) [hereinafter Commission Order]. Secretary of Defense, Donald Rumsfeld, by order of the President, issued orders and regulations concerning the creation and use of military commissions for the trial of enemy combatants.

150. *Id.* § 4(C)(1)-(2).

151. *Id.* § 4(C)(3). Section 4(C)(3)(b) requires that a civilian attorney: (1) be a United States citizen; (2) be admitted to the practice of law in a State, district, territory or possession of the United States; (3) not be subject to any disciplinary action or sanction by any court or governmental authority; (4) be eligible for access to information classified at the level of “secret” or higher; and (5) sign a written agreement to comply with all applicable regulations or instructions of counsel. *Id.*

152. *Id.* § 4(C)(3)(b). “The qualification of a Civilian Defense Counsel does not guarantee that person’s presence at closed Commission proceedings or that persons access to any information protected under Section 6(D)(5).” *Id.*

153. Sean D. Murphy, *U.S. Nationals Detained as Unlawful Combatants*, 96 AM. J. INT’L L. 956, 981 (Oct. 2002). In remanding a district court order mandating access to counsel for Yaser Esam Hamdi, the Fourth Circuit Court of Appeals stated:

The order arises in the context of foreign relations and national security, where a court’s deference to the political branches of our national government is considerable.

2. *Limitations at Trial*

Individuals subject to a military commission are not tried before a jury, but before appointed officers of the United States armed forces.¹⁵⁴ Members of the commission are charged with the duty of providing a full and fair trial,¹⁵⁵ and safeguards similar to those in a civilian criminal trial are imposed.¹⁵⁶ However, Section 6(D) of the Commission Order, detailing the use of evidence during trial, allows the government to withhold evidence from the defense on essentially an ad hoc basis, thereby preventing a fair trial from actually taking place.¹⁵⁷ In addition, the Commission Order essentially removes a defendant's right against compelled self-incrimination prior to trial.¹⁵⁸

3. *Restrictions of Right to Judicial Review*

Unlike typical criminal cases, an enemy combatant may not seek review of the military commission's decision by an appellate court.¹⁵⁹ Rather, the Secretary of Defense designates a panel of three military officers or civilians to review the commission's trial record.¹⁶⁰ After the Review Panel has made its decisions and recommendations to the

It is the President who wields "delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations—a power which does not require a basis for its exercise an act of Congress." And where as here the President does act with statutory authorization from Congress, there is all the more reason for deference.

Id. at 981.

However, the United States District Court for the Southern District of New York ruled that enemy combatant Jose Padilla should be given the right to speak to an attorney for the limited purpose of dealing with a habeas petition. *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (citing *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304, 320 (1936)).

154. Commission Order, *supra* note 149, § 4(A). Each commission will be comprised of three to seven members. *Id.* § 4(A)(2).

155. *Id.* § 6(B)(1).

156. *Id.* § 5.

157. *Id.* § 6(D)(5)(a)-(c). The presiding officer may issue protective orders to safeguard "protected information" and limit its disclosure to defense counsel by deleting it from documents, substituting a portion of the documents with summaries of the protected information, or even closing off proceedings to civilian defense counsel. *Id.* Section 9 of the Commission Order gives great breadth to Section 6(D)(5), which states, "Nothing in this Order shall be construed to authorize disclosure of state secrets to any person not authorized to receive them." Commission Order, *supra* note 149, § 6(D)(5)(a)-(c).

158. *Id.* § 5(F). "The Accused shall not be required to testify during trial. A Commission shall draw no adverse inference from an Accused's decision not to testify. *This subsection shall not preclude admission of evidence of prior statements or conduct of the Accused.*" *Id.* (emphasis added). This provision explicitly removes the right of an individual, implied by the Fifth Amendment, to prevent law enforcement officers from coercing self-incriminating statements from him.

159. *Id.* § 6(H).

160. *Id.* § 6(H)(4). The Order requires that at least one member of the Review Panel have experience as a judge. *Id.* The Review Panel is charged with the duty of reviewing the written record of trial and either returning the case to the Appointing Authority for further proceedings

Secretary of Defense, the President has authority to make the final decision on any conviction or sentence.¹⁶¹

4. *Indefinite Confinement*

One of the most severe consequences of being labeled an enemy combatant is the individual's potential for indefinite confinement.¹⁶² When the President determines that an individual is an enemy combatant, apparently the government can place him in a military camp indefinitely.¹⁶³

B. The Enemies: Today's Use of Enemy Combatant Designations

Subsequent to the attacks on September 11, the government arrested and detained hundreds of suspected terrorists, several of whom are American citizens.¹⁶⁴ Of the currently detained Americans, some are charged with crimes in federal district courts,¹⁶⁵ while others are designated enemy combatants, detained indefinitely with no charges brought against them. President Bush's November Order specifically deals with non-American citizens.¹⁶⁶ He has made no similar order for citizens of the United States. This section presents profiles of several individuals suspected of supporting al Qaeda in taking arms against America and our government's response to each.

(due to a majority finding of material error of law), or forwarding the case to the Secretary of Defense with a recommendation as to disposition. Commission Order, *supra* note 149 § 6(H)(4).

161. November Order, *supra* note 24, § 4(c)(8). This section of the military order also authorizes the President to designate the Secretary of Defense with the authority to make a final decision. Commission Order, *supra* note 149, § 6(H)(4).

162. "It has long been established that if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detainment of him is a lawful one." Hamdi v. Rumsfeld, 296 F.3d 278, 283 (4th Cir. 2002) (citing *Ex parte Quirin*, 317 U.S. at 25-26). It appears that these men might be able to challenge their confinement through habeas corpus petitions, but this has proved difficult. Hamdi has been unable to file a petition on his own behalf, and his attorney was unable to file a petition as his "next friend" because no "preexisting relationship" existed between the two. Padilla v. Bush, 233 F. Supp. 2d 564, 576 (S.D.N.Y. 2002). See *supra* note 24. In Padilla's case, however, the court allowed his attorney to act as his next friend in order to file a habeas corpus petition. Padilla, 233 F. Supp. 2d at 575-79. Ultimately, Judge Mukasey determined the applicable test in determining the lawfulness of an enemy combatant's detention is whether "some evidence" supports the designation and found Padilla's detention to be appropriate under the given circumstances. *Id.* at 587-97.

163. See discussion on detainment of Yaser Hamdi and Jose Padilla, *infra* notes 190-238 and accompanying text.

164. "The government recently disclosed that, since September 11th, it detained a total of 571 individuals on immigration violations, and 74 people were still being held in INS custody as of June 13, 2002." Sonnett, et al., *supra* note 22 (citing Center for National Security Studies v. United States Dept. of Justice, Case No. 01-2500 (Slip. Op. at p. 7)).

165. See *infra* notes 167-189 and accompanying text.

166. November Order, *supra* note 24, § 2(a). "The term 'individual subject to this order' shall mean any individual who is not a United States citizen. . . ." *Id.*

1. John Phillip Walker Lindh

On November 24, 2001, Northern Alliance troops captured John Walker Lindh, an American-born citizen and resident of California, after a prison uprising among Taliban fighters outside of Mazar-e-Sharif.¹⁶⁷ Walker was charged in a ten-count indictment for, *inter alia*, conspiring to murder Americans abroad.¹⁶⁸ Prior to being charged, Walker remained in United States military custody. He had no rights of an American citizen or a traditional prisoner of war.¹⁶⁹ While in captivity, military officials frequently interrogated Walker without the aid of counsel.¹⁷⁰ He eventually admitted involvement with al Qaeda.¹⁷¹ The government classified Walker as a "battlefield detainee,"¹⁷² which assumedly gave the military a right to interrogate him without a lawyer present.¹⁷³ However, charges were eventually brought against Walker in civilian court.¹⁷⁴ Walker pled guilty to supplying services to the Taliban and carrying explosives during commission of a felony on July 15, 2002¹⁷⁵ as part of a plea bargain with the government.¹⁷⁶ In this plea bargain, the United States promised not to treat Walker as an enemy combatant.¹⁷⁷ Due to his cooperation, Walker received a sentence of only twenty years in prison.¹⁷⁸

167. See Proffer of Facts in Support of Defendant's Suppression Motions at 3-5, *United States v. Lindh* (E.D. Va. 2002) (No. 02-37-A). See also Jim Puzzanghera, *The Case of 'Taliban John': Treason Among Options for Charging American*, SEATTLE TIMES, Dec. 20, 2001, at A3.

168. Toni Locy, *Court Hearing Begins on Use of Lindh Statements*, USA TODAY, July 15, 2002, at A.07.

169. Puzzanghera, *supra* note 167. Walker was first held in Kandahar, at U.S. Marines Camp Rhino, and was transferred to the USS Peleliu in the Arabian Sea. *Id.*

170. Locy, *supra* note 168. These interrogations took place over six sessions from November 25, 2001, to December 10, 2001. *Id.* During this time, Walker admitted he trained at an al Qaeda terrorist camp, met with Osama bin Laden and learned of several followers who were sent to the United States on suicide missions prior to September 11, 2001. *Id.*

171. *Id.*

172. Puzzanghera, *supra* note 167 at A3. "[White House Press Secretary Ari] Fleischer and administration officials are careful not to call him a prisoner of war. Such a designation would set in place a series of protections under the international convention." *Id.* The term "battlefield detainee" is not a term found in military law; rather, it is a description used to avoid the implications of labeling an individual and prisoner of war or an American citizen tried in civilian court, which would include the right to an attorney. *Id.*

173. *Id.*

174. Martha Neil, *Avoiding the 'Enemy Combatant' Label*, 1 No. 27 ABA J. E-REPORT, July 19, 2002. The government had previously ruled out trying Walker in a military commission during plea-bargaining. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

2. *The "Buffalo Six"*

The government accused six men¹⁷⁹ from Lackawanna, New York—American citizens of Yemeni descent—of attending an Islamic extremist camp in Afghanistan in 2001.¹⁸⁰ On October 22, 2002, the government charged these men with conspiracy to provide material support and resources to a foreign terrorist nation and with providing material support to al Qaeda¹⁸¹ under the Anti-Terrorism and Effective Death Penalty Act of 1996.¹⁸² The Act gave the federal court in Buffalo jurisdiction over the case, thereby allowing the men an opportunity to retain and speak with counsel. The men appeared in United States District Court on October 23, 2002, and pled not guilty to all felony counts.¹⁸³

3. *The "Portland Six"*

In October 2002, the government indicted a group of six individuals, five of whom were American citizens, for their involvement with al Qaeda.¹⁸⁴ The charges against the individuals included conspiracy to levy war against the United States, conspiracy to provide material support and resources to al Qaeda, conspiracy to contribute services to al Qaeda and the Taliban, and possession firearms in furtherance of crimes of violence.¹⁸⁵ According to Attorney General John Ashcroft, five of the individuals unsuccessfully attempted to enter Afghanistan through China.¹⁸⁶ One of the individuals stayed behind and wired money to the rest with knowledge that they would use it in an attempt to reach Afghanistan to aid al Qaeda and the Taliban.¹⁸⁷ Unlike the "Buffalo Six," none of the individuals involved in these indictments

179. Jim Memmott, *Six in Terror Case Plead Not Guilty*, DEMOCRAT & CHRON. (Rochester, NY), Oct. 23, 2002, at 7A. These men included Sahim Alwan, Yasein Taher, Mukhtar al-Bakri, Yahya Goba, Shafal Mosed, and Faysal Galab.

180. *Six in US Court Accused of Supporting al Qaeda*, IRISH TIMES, Oct. 23, 2002, at P8. The men were alleged to have attended an anti-American speech at the camp, given by Osama bin Laden, thereby providing material support to and resources to al Qaeda. Memmott, *supra* note 179.

181. Memmott, *supra* note 179.

182. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 (s 735) [hereinafter 1996 Act].

183. Memmott, *supra* note 179.

184. Andrew Kramer, *Six Indicted on Terror Charges*, CENTRE DAILY TIMES, Oct. 5, 2002. Of these individuals, three were arrested in Oregon, including Jeffrey Leon Battle, October Martinique Lewis, and Patrice Lumumba Ford; Muhammad Bilal was arrested in Detroit; Ahmed Bilal and Abdullah al Saub were being sought overseas. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* Lewis, Battle's ex-wife, wired money to him on eight separate occasions while he was abroad. *Id.*

made it to Afghanistan, thus creating skepticism over the government's case.¹⁸⁸ Also unlike the Buffalo Six, these individuals turned to Osama bin Laden after the attacks of September 11 for unclear motives.¹⁸⁹

4. *Yaser Esam Hamdi*

The government took Yaser Esam Hamdi, an American citizen born in Louisiana, into custody as an alleged enemy combatant during military operations in Afghanistan.¹⁹⁰ The military initially took Hamdi to Camp X-Ray in Guantanamo Bay before discovering his American citizenship.¹⁹¹ The government believed Hamdi possessed vital information concerning terrorist plots against America and detained him as an enemy combatant in accordance with the laws and customs of war.¹⁹² On May 29, 2002, the United States District Court for the Eastern District of Virginia, in a consolidated habeas petition hearing,¹⁹³ ordered the government to allow Hamdi unmonitored access to his attorney.¹⁹⁴ On June 11, 2002, the district court appointed Public Defender Frank Dunham as counsel for Hamdi, ordering the government to allow Dunham unmonitored access to Hamdi.¹⁹⁵ The United States Court of Appeals for the Fourth Circuit stayed the district court's order pending appeal by the government.¹⁹⁶ On appeal, the government classified Hamdi as an enemy combatant and contended that he had no general rights under the Constitution to meet

188. Andrew Murr et al., *The Portland Six; Joining Jihad; They Had Guns, and Plans for Afghanistan. Busting a Would-be Cell*, NEWSWEEK, Oct. 14, 2002, at 26.

189. *Id.*

190. *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002). Hamdi's petition for writ of habeas corpus to the Supreme Court stated that he was taken into custody in the fall of 2001 and transferred to Guantanamo Bay in January 2002. *Id.*

191. *Id.* It was discovered that Hamdi was born in Louisiana and may not have renounced his citizenship, at which point he was transferred to the Norfolk Naval Station Brig in April 2002. *Id.*

192. *Id.* at 279. Hamdi was still held at the military brig as of his Fourth Circuit petition hearing in June 2002. *Id.*

193. *Hamdi*, 296 F.3d at 279. On May 10, 2002, the Federal Public Defender filed a habeas petition naming Hamdi and himself as next best friend, which was consolidated with a separate habeas petition filed by Christian Peregrim, a private citizen, on behalf of Hamdi. *Id.* Both of these petitions were dismissed following the filing of a petition by Hamdi's father, Esam Fouad Hamdi. *Id.* at 280. The Court of Appeals for the Fourth Circuit determined that Hamdi's father was a proper next friend. *Hamdi v. Rumsfeld*, 294 F.3d 598, at 600 n.1 (4th Cir. 2002).

194. *Hamdi*, 296 F.3d at 280. This order was supported on June 11, 2002, when the district court appointed the Public Defender as counsel for Hamdi based on a separate petition filed by Hamdi's father. *Id.*

195. *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003).

196. *Hamdi*, 296 F.3d at 281.

with counsel.¹⁹⁷ On July 12, 2002, the Fourth Circuit reviewed the district court's June 11 order and disagreed with its interpretation of Hamdi's status.¹⁹⁸ The court found that the President was best suited for the task of determining who is an enemy combatant¹⁹⁹ and how to deal with such an individual,²⁰⁰ regardless of his citizenship.²⁰¹ Subsequent to the Fourth Circuit's remand, the district court held a hearing on July 18, 2002, asking, "[W]ith whom is the war I should suggest that we're fighting?" The court further inquired, "[W]ill the war never be over as long as there is any member [or] any person who might feel that they want to attack the United States of America or [its citizens]?"²⁰² On July 25, 2002, the government responded to these questions in a motion to dismiss Hamdi's petition for a writ of habeas corpus.²⁰³ Attached to its motion was an affidavit from Michael Mobbs, the Special Advisor to the Under Secretary of Defense for Policy (Mobbs Declaration).²⁰⁴ The Mobbs Declaration confirmed the material factual allegations in Hamdi's petition and described the circumstances around Hamdi's seizure and subsequent designation as an enemy combatant.²⁰⁵ On August 13, 2002, the district court held a hearing to review the sufficiency of the Mobbs Declaration.²⁰⁶ The court determined on August 16, 2002, that the Declaration "falls far short" of supporting Hamdi's detention.²⁰⁷ The government thereafter filed a motion to certify the district court's August 16 order for interlocutory appeal.²⁰⁸ On review, the Fourth Circuit declared:

197. *Id.* at 282. The government asserted that Hamdi's capture on the battlefield in a foreign land caused his "enemy combatant" status and relinquished any rights he would have in civilian courts. *Id.* The Public Defender contended that Hamdi's status as an American citizen detained within the United States differentiates him from aliens located outside of the United States and therefore should allow him a right to counsel. *Id.*

198. *Id.* The court said, "[T]he June 11 order apparently assumes (1) that Hamdi is not an enemy combatant or (2) even if he might be such a person, he is nonetheless entitled not only to counsel, but to immediate and unmonitored access thereto." *Id.*

199. *Hamdi*, 296 F.3d at 283.

200. *Id.* (citing AUTHORIZATION FOR USE OF MILITARY FORCE, Pub. L. No. 107-40115 Stat 224 (2001)).

201. *Id.* citing *Quirin*, 317 U.S. 1, 17 (1942). The Fourth Circuit did not draw a distinction between the terms "unlawful combatant" and "enemy combatant," thereby allowing for their use interchangeably.

202. *Hamdi*, 316 F.3d at 461.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 462.

207. *Id.* In the district court's August 13 opinion, it ordered the government to turn over copies of Hamdi's statements, the names and addresses of all interrogators who questioned him, statements by the Northern Alliance regarding the circumstances of Hamdi's surrender, and a list of all locations of his detention subsequent to his surrender. *Hamdi*, 316 F.3d at 462.

208. *Id.*

[When] a habeas petitioner has been designated an enemy combatant and it is undisputed that he was captured in a zone of active combat operations abroad, further judicial inquiry is unwarranted when the government has responded to the petition by setting forth factual assertions which would establish a legally valid basis for the petitioner's detention.²⁰⁹

The Fourth Circuit held: 1) Hamdi's detention was authorized by Congress; 2) Hamdi had no right under the Geneva Convention to determine his status as an enemy belligerent through a formal hearing; 3) the district court's order conflicted with the constitutional war-making powers of the President and Congress; and 4) the Mobbs Declaration was sufficient to establish that Hamdi's detention conformed with the legitimate exercise of the president's war powers.²¹⁰ The Court was careful to limit its ruling to the specific facts in Hamdi's case, rejecting "the summary embrace of 'a sweeping proposition—namely that with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so.'"²¹¹ Meanwhile, Hamdi is currently being held under military control as an enemy combatant.²¹²

5. *Jose Padilla*

Jose Padilla, also known as Abdullah al Muhajir, was detained at O'Hare International Airport in Chicago, Illinois, on May 8, 2002, pursuant to a material witness warrant.²¹³ On May 15, 2002, Padilla appeared before the United States District Court for the Southern District of New York, and Public Defender Donna Newman was appointed to represent him.²¹⁴ On June 7, 2002, Padilla and Newman

209. *Id.* at 476.

210. *Id.* at 450.

211. *Id.* at 476 (quoting *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002)). The Court differentiates Hamdi's situation, that of "the undisputed detention of a citizen during combat operation undertaken in a foreign country and a determination by the executive that the citizen was allied with enemy forces," from that of individuals captured on American soil. *Id.* It concludes by saying, "Judicial review does not disappear during wartime, but the review of battlefield captures in overseas conflict is a highly deferential one." *Hamdi*, 316 F.3d at 476.

212. Richard A. Serrano, *Judge Urged Not to Free Man as Combatant*, L.A. TIMES, July 18, 2003, at A22. At the time this Comment's publication, the Fourth Circuit denied a rehearing *en banc*. *Hamdi v. Rumsfeld*, 337 F.3d 335 (4th Cir. 2003). Subsequently, on January 9, 2004, the Supreme Court granted certiorari. 124 S. Ct. 981 (U.S. Jan. 9, 2004) (No. 03-6696). Hamdi's case will be heard by the Supreme Court on April 28, 2003. See http://supreme.lp.findlaw.com/supreme_court/docket/2003/april.html (last visited Mar. 2, 2004).

213. Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d. 564, 568 (S.D.N.Y. 2002). The United States District Court for the Southern District of New York issued the warrant based on facts provided in an affidavit by a special agent of the FBI that Padilla had information pertaining to the September 11 attacks. *Id.* at 571.

214. *Id.*

submitted a motion to vacate the warrant.²¹⁵ The government subsequently notified the district court, *ex parte*, that it would sign an order vacating the warrant because on June 9, 2002, President Bush designated Padilla as an enemy combatant.²¹⁶ The June 9 order grounded President Bush's declaration of Padilla as an enemy combatant on the following basis:

[He] is "closely associated with al Qaeda," engaged in "hostile and war-like acts" including "preparation for acts of international terrorism" directed at this country, possesses information that would be helpful in preventing al Qaeda attacks, and represents "a continuing, present and grave danger to the national security of the United States."²¹⁷

At that time, the Department of Defense took Padilla into custody and transferred him to a naval brig in Charleston, South Carolina.²¹⁸ Padilla, an American-born citizen and resident of Chicago, was accused of collaborating with members of al Qaeda to build a radiological bomb.²¹⁹ Newman filed a habeas corpus petition on behalf of Padilla pursuant to 28 U.S.C. §2241.²²⁰ On December 4, 2002, district court Judge Michael Mukasey ruled, *inter alia*, that Newman could act as next friend for the purpose of challenging by habeas corpus petition Padilla's detention as an unlawful combatant, that Secretary of Defense Donald Rumsfeld was a proper respondent in the case, that the President had the power to direct that an American citizen captured in the United States be detained as an unlawful combatant, and that the President's determination would be sustained as to Padilla if the court found, after hearing from Padilla, that there was some evidence to support it.²²¹ In his ruling, Judge Mukasey directed the government to provide Padilla with *limited* access to counsel:

[F]or the purpose of submitting to the court facts bearing upon his petition, under such conditions as the parties may agree to, or absent agreement, such conditions as the court may direct so as to

215. *Id.*

216. *Id.* The June 9 Order sets forth President Bush's findings with respect to Padilla. *Id.* at 572. President Bush relied in large part on a declaration by Michael H. Mobbs, an employee on the Department of Defense, which Bush declared extremely confidential. *Id.* For more information on the Mobbs Declarations, see *supra* note 204 and accompanying text.

217. *Padilla*, 233 F. Supp. 2d 568 (quoting June 9 Order ¶¶ 2-5).

218. *Id.*

219. Frederick N. Egler, Jr., *Terrorism and the Rule of Law*, 4 No. 18 LAW. J. 4 (Sept. 6, 2002). A bomb of this type is often referred to as a "dirty" bomb.

220. *Padilla*, 233 F. Supp. 2d at 569. Newman filed this petition as Padilla's next friend. *Id.* The court found Newman had standing to act as Padilla's next friend because she had a sufficiently close pre-existing relationship with Padilla and Padilla was held incommunicado as an enemy combatant. *Id.*

221. *Id.* at 564.

foreclose, so far as possible, the danger that Padilla will use his attorneys for the purpose of conveying information to others.²²²

Judge Mukasey carefully limited the purpose for providing Padilla with access to counsel, stating, "no general right to counsel in connection with questioning has been hypothesized . . . and thus the interference with interrogation would be minimal or nonexistent."²²³ In his order, Judge Mukasey required the government's attorneys to meet with Newman to establish the terms of her contact with Padilla.²²⁴ In response, the government filed a motion for reconsideration in part, asking Mukasey to re-evaluate his decision to provide Padilla with access to counsel.²²⁵ In support of its motion, the Government attached a declaration by Vice Admiral Lowell E. Jacoby, Director of the Defense Intelligence Agency, which set forth the "factual predicate for the government's motion."²²⁶ With strong reservations, Mukasey granted the government's motion.²²⁷ In ruling on it, Mukasey described the Jacoby Declaration as "speculative"²²⁸ and argued that there are plausible scenarios, other than withholding access to counsel, that would be "far more beneficial to the government than the prospect of waiting while Padilla . . . toughs it out for whatever period of time he may think someone on the outside might help him."²²⁹

222. *Id.* at 605.

223. *Id.* at 603.

224. *Padilla*, 233 F. Supp. 2d at 605. This conference was to take place by December 30, 2002. *Id.* On December 23, 2002, the Government submitted a letter to Judge Mukasey, requesting a brief adjournment of the conference. *Id.* The letter also stated that the Government believed it necessary to present the Court with additional factual information to enable the Court to assess the feasibility of different conditions that the defense may propose in regards to Padilla's contact with counsel. *Padilla v. Rumsfeld*, 243 F. Supp. 2d 42, 44-45 (S.D.N.Y. March 11, 2003) (citing Letter of Bruce to the Court of 12/23/02, at 1). The Court granted an adjournment until January 8, 2003. *Id.* at 45.

225. *Padilla*, 243 F. Supp. 2d at 46.

226. *Id.* The Jacoby Declaration described, *inter alia*, the intelligence-gathering process and the "importance of maintaining its continuity and integrity." *Id.* at 49. Further, the declaration described the "interrogation techniques used by the [Defense Intelligence Agency], and its assessment of the danger of interrupting such interrogation to permit Padilla to consult with counsel." *Id.* The declaration stated, "Any insertion of counsel into the subject-interrogator relationship, for example—even if only for a limited duration or for a specific purpose—can undo months of work and may permanently shut down the interrogation process." *Id.* (citing Jacoby Decl., at 4-5).

227. *Padilla*, 243 F. Supp. 2d at 44. Mukasey was hesitant in response to the Government's motion because it was filed in violation of Local Civil Rule 6.3, which requires a motion for reconsideration to be filed within ten days after the court's determination of the original motions. *Id.* The Government's motion was filed well after the deadline. However, he interpreted the rule as a guide for what the court may do to protect itself rather than what a court must do in every situation. *Id.* at 48. He granted the Government's motion to further stress his original ruling. *Id.*

228. *Id.* at 52.

229. *Id.* at 53.

Mukasey reiterated his belief that, even if the Jacoby Declaration was reliable, Padilla had the right to present facts in connection with his petition, and the only feasible way for him to do so was through a lawyer.²³⁰ He stated, "Unless [Padilla] has the opportunity to make a submission, this court cannot do what the applicable statutes and the Due Process Clause require it to do."²³¹ In conclusion, Mukasey again ordered counsel to consult with one another regarding the terms of Padilla's access to counsel, saying:

Lest any confusion remain, this is not a suggestion or a request that Padilla be permitted to consult with counsel, and it is certainly not an invitation to conduct a further "dialogue" about whether he will be permitted to do so. It is a ruling—a determination—that he will be permitted to do so.²³²

On March 20, 2003, the Government notified the court by letter that there were no conditions upon which it would agree to allow Padilla to consult with an attorney.²³³ In its letter, the Government informed Mukasey that it intended to ask the court "either to determine the conditions for consultation on its own," or to certify for interlocutory appeal the determination that Donna Newman may act as next friend in pursuing the habeas corpus petition on Padilla's behalf.²³⁴ On April 9, 2003, over Newman's objection on Padilla's behalf, Judge Mukasey granted the Government's motion for interlocutory appeal.²³⁵ Judge Mukasey broadened the issues for appeal beyond that requested by the Government, however, allowing consideration of all

230. *Padilla*, 243 F. Supp. 2d at 54. The government argued that the standard of proof in this case, which is "some evidence," mooted the requirement that Padilla be heard. *Id.* The government asserted that the "some evidence" standard had been met as long as the evidence relied upon by the President (in the Mobbs Declaration) justified his detainment of Padilla. *Id.* at 54. Mukasey disagreed with the Government, finding that exculpatory evidence of a defendant is relevant to whether the government has met the "some evidence" standard if the evidence directly undermines the reliability of the government's evidence. *Id.* at 55-56.

231. *Id.* at 56. Mukasey continued:

[The court's job is to] confirm what frankly appears likely from the Mobbs Declaration but cannot be certain if based only on the Mobbs Declaration—that Padilla's detention is not arbitrary, and that, because his detention is not arbitrary, the President is exercising a power vouchsafed to him by the Constitution. As set forth in the [December 4 opinion], because the only practicable way to present evidence, if he chooses to do so, is through counsel, he must be permitted to consult with counsel.

Id.

232. *Padilla*, 243 F. Supp. 2d at 57.

233. *Padilla v. Rumsfeld*, No. 02 Civ. 4445 (MBM), 2003 WL 1858157, at *1 (S.D.N.Y. Apr. 9, 2003).

234. *Id.* (citing Letter of Comey to the Court of 3/20/03, at 1-2). The government relied on 28 U.S.C. § 1292(b) in asserting its right to interlocutory appeal. *Id.*

235. *Id.* Newman urged that that certification for appeal was an attempt by the government to "further delay the progress of the case." *Id.* Mukasey noted that, while § 1292(b) is meant to be applied only in exceptional circumstances, "it would be deeply irresponsible for a district court

determinations from the orders of December 4, 2002, and March 11, 2003.²³⁶ He stated, "The resolution of these questions upon an immediate appeal is likely to advance materially the ultimate termination of the litigation."²³⁷ Padilla is still being held without charges and without access to an attorney based on his enemy combatant status.²³⁸

C. *An Analysis of President George Walker Bush's Actions*

President Bush did not exceed his authority as Commander-in-Chief by creating military commissions for the trial of enemy combatants.²³⁹ In doing so, however, President Bush improperly extended the commissions' jurisdictional scope set forth in previous cases. While the government must procure a means to prevent future attacks on American soil, the current procedures implemented by the Bush

to deny a brief stay at least to permit further application to the Court of Appeals in the face of the government's insistence that issues of national security are at stake." *Id.*

236. *Padilla*, 2003 WL 18581587, at *2. These questions include: 1) whether Secretary of Defense Rumsfeld was the proper respondent in the case; 2) whether the United States District Court for the Southern District of New York had personal jurisdiction over Secretary Rumsfeld; 3) whether the President has the authority to designate an American citizen captured within the United States as an enemy combatant thereby allowing him to be detained for the duration of armed conflict with al Qaeda; 4) what burden the government must meet to detain a petitioner as an enemy combatant; 5) whether the petitioner has the right to present facts in support of his habeas corpus petition; and 6) whether it was a proper exercise of the district court's discretion to direct that Padilla be afforded access to counsel for the purpose of presenting facts in support of his petition. *Id.*

237. *Id.* At the time of this Comment's publication, the Court of Appeals has not yet ruled on the government's interlocutory appeal. Padilla is still being held without charges and without access to an attorney based on the theory that he is an enemy combatant. *Padilla*, 233 F. Supp. 2d at 571. "Newman has averred that she was told she would not be able to visit Padilla at the South Carolina facility, or to speak with him; she could write to Padilla, but that he might not receive the correspondence." *Id.* (citing Newman Affidavit of Sept. 4, 2002 ¶ 8).

238. *Id.* at 571. At the time of this Comment's publication, a divided panel of the United States Court of Appeals for the Second Circuit held that the Bush Administration lacks the authority to detain Padilla as an enemy combatant without a more explicit grant of authority from Congress as required under 18 U.S.C. § 4001(a) (2000). *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003). Further, all three judges on the panel agreed that Padilla is entitled to meet with his attorney. *Id.* The Supreme Court granted certiorari on February 20, 2004, *Rumsfeld v. Padilla*, No. 03-1027, 2004 WL 95802 (U.S. Feb. 20, 2004), and will hear Padilla's case on April 28, 2004. See http://supreme.lp.findlaw.com/supreme_court/docket/2003/april.html (last visited Mar. 2, 2004).

239. President Bush had both the protection of the Constitution and guidance of the Supreme Court supporting presidential creation of military commissions. Neither *Milligan* nor *Quirin* concluded that the President clearly had the authority to create military commissions without the consent of Congress. In addition, 18 U.S.C. § 4001(a) acts as a bar against the detainment of American citizens absent congressional authorization. Vladeck, *supra* note 141. However, President Bush relied on several statutes, the Constitution, and a Congressional joint resolution in validating his November Order. See *supra* notes 134-137.

Administration fail to adequately “protect the innocent and prevent possible abuses of power.”²⁴⁰

The events of September 11 are similar to those in *Ex parte Quirin* and justify the President’s creation of military commissions for the trial of individuals associated with those attacks. In applying *Quirin*, however, President Bush has ignored the Court’s emphasis on the type of conduct worthy of defining an enemy combatant and failed to offer his own definition in return. Such disregard carries with it significant potential for an abuse of power. In addition, the procedures implemented for the trial of enemy combatants²⁴¹ are unlawfully depriving two American citizens of their civil liberties and have opened the door to a potential abuse of the separation of powers.²⁴²

1. A Wavering Definition of Enemy Combatant

In reliance on Congress’s joint resolution authorizing him to use all necessary and appropriate force against individuals involved in terrorist attacks hostile toward the United States,²⁴³ President Bush reinitiated the use of the enemy combatant designation previously used by President Roosevelt during World War II. In addition, President Bush created military commissions for the trial of any individual he determined was an enemy combatant. As previously discussed, adequate precedent exists to justify the Bush Administration’s use of the enemy combatant label and his formation of military commissions.²⁴⁴ However, *Quirin*, the case directly relied upon by President Bush in

240. Sonnett, et al., *supra* note 22.

241. See Commission Order, *supra* note 149.

242. See *infra* notes 255-259 and accompanying text. At the time this Comment went to publication, President Bush publicly designated another individual as an enemy combatant. On June 23, 2003, President Bush declared Ali Saleh Kahlah Al-Marri, a former resident of Peoria, Illinois, as an enemy combatant. Cam Simpson, *Bush Names 3rd Enemy Combatant*, CHI. TRIB., June 24, 2003, at 1. According to administration officials, Al-Marri came to Chicago on September 10, 2001, at coordinate al Qaeda operatives for a second round of terrorist attacks. *Id.* Al-Marri is a 37-year-old Qatari national and is the first person facing criminal charges in the United States to be “pulled out of the civilian justice system and placed into military custody.” *Id.* While Al-Marri was not involved in the September 11 bombings, Larry Mefford, the FBI assistant director for counterterrorism, said he was a key operative of al Qaeda. *Id.* Al-Marri was initially scheduled to stand trial in Peoria on July 21, 2003 on fraud-related charges and for allegedly lying to the FBI. *Id.* These charges were dropped subsequent to Bush’s declaration, and Al-Marri is now jailed in a naval brig in Charleston, South Carolina. *Id.* While Al-Marri is not an American citizen, his public classification as an enemy combatant deserves mention because it displays Bush’s continued use of the label over two years after al Qaeda’s attack on America.

243. PL 107-40, *supra* note 131 and accompanying text. Bush interpreted that authority as allowing him to designate any individual posing a potential threat to the United States as an “enemy combatant.” See *supra* notes 134-140 and accompanying text.

244. See *supra* notes 43-124 and accompanying text.

asserting his authority, also placed limitations on its scope. Assuming the definition of an enemy combatant set forth in *Quirin* is still good law, two elements must be present. First, an individual must not be dressed in clothing that identifies him as a belligerent.²⁴⁵ Second, the person must secretly cross enemy lines for the purpose of waging war by destruction of life or property.²⁴⁶ The Bush Administration has ignored both requirements.

Since the attacks of September 11, only two American citizens, Yaser Hamdi and José Padilla, have been designated enemy combatants.²⁴⁷ The facts of Padilla's case²⁴⁸ closely echo those of the *Quirin* defendants and might justify the designation of Padilla as an enemy combatant. On the other hand, Hamdi was captured in Afghanistan while visibly holding arms against America.²⁴⁹ He neither entered the United States nor attempted to disguise his enemy status, making his enemy combatant designation inconsistent with *Quirin's* holding. Furthermore, Hamdi's capture was practically identical to John Walker Lindh's,²⁵⁰ who recently pled out of enemy combatant status.²⁵¹ Lindh will possibly be released from prison in twenty years, while Hamdi is presently being detained indefinitely with no charges brought against him.²⁵² To frustrate the situation further, non-citizen terrorist suspects whose conduct falls squarely within the *Quirin* definition are not being labeled enemy combatants. For example, Zacarias Moussaoui, the alleged twentieth terrorist involved in the attacks on September 11, was arrested and charged with conspiracy to commit terrorism and the murder of a federal employee.²⁵³ Moussaoui is facing trial in a federal court, however, not in a military tribunal.²⁵⁴

President Bush has disregarded *Quirin's* guidance, thereby eliminating any determinative factor in the labeling of an enemy combatant. This has resulted in an arbitrary and random designation of enemy combatants. It appears that President Bush can label any individual whom he determines is a danger to our country or believes has information concerning potential threats to our safety as an enemy

245. See *supra* note 115 and accompanying text.

246. See *supra* note 131 and accompanying text.

247. See *supra* notes 190-237 and accompanying text.

248. See *supra* notes 213-237 and accompanying text.

249. See *supra* notes 190-201 and accompanying text.

250. See *supra* notes 66-75 and accompanying text.

251. See *supra* notes 66-75 and accompanying text.

252. See *supra* note 212.

253. Philip Shenon & Eric Schmitt, *U.S. Considers Plan to Put Moussaoui Before Tribunal*, PITT. POST-GAZETTE, at A.17.

254. *Id.*

combatant. This allows for a potential abuse of power. The label has become a bargaining chip, used by the government to coerce cooperation from suspected terrorists. But unlike a typical plea bargain, in which the prosecution offers a lower charge in return for the defendant's cooperation, the government is bargaining with constitutional rights. The first ten amendments to the Constitution are known as the Bill of Rights, not the Bill of Privileges. The government cannot "offer" a defendant a predetermined right in return for his or her cooperation. For this reason, President Bush should be precluded from using the enemy combatant designation on an individual unless that person's conduct fits the predetermined definition set forth in *Quirin*.

2. A Deprivation of Due Process

While Congress provided President Bush with authority to create military commissions,²⁵⁵ the trial procedures within the commissions must "comport with constitutional due process."²⁵⁶ Unfortunately, *Quirin* did not take a position as to what minimal procedural requirements would be constitutional.²⁵⁷ Subsequent to his order creating the military commissions, President Bush gave himself final review of all cases tried before the military commissions, thereby removing judicial review of any case involving an enemy combatant from the federal courts.²⁵⁸ First, President Bush places the enemy combatant label on whomever he desires.²⁵⁹ Second, he creates a military commission for the trial of that individual—a commission over which he determines the procedures and has final appellate review.²⁶⁰ Third, he removes all judicial review of these trials from the federal courts.²⁶¹ It appears that President Bush, in an effort to protect our nation's security, has

255. See November Order, *supra* note 24.

256. French, *supra* note 45, at 1251.

257. *Id.* Of course, Bush's failure to use *Quirin*'s definition of enemy combatant leaves us unsure whether any guidelines for procedural requirements of a military commission would have been followed anyway.

258. See November Order, *supra* note 24, § 4(c)(8).

259. *Id.* § 2(a). "The term 'individual subject to this order' shall mean any individual . . . with respect to whom I determine from time to time . . ." *Id.* (emphasis added).

260. *Id.* § 1(f). "I find consistent with [10 U.S.C. § 836], that it is not practicable to apply in military commissions under this order the principles of law and rules of evidence generally recognized in the trial of criminal cases in United States district courts." President Bush delegated much of this authority to Secretary of Defense Donald Rumsfeld. *Id.* § 4(b) (stating "As a military function and in light of the findings in section [one] . . . the Secretary of Defense shall issue such orders and regulations . . . as may be necessary to carry out [a trial by military commission]").

261. *Id.* § 4(c)(8). "[S]ubmission of the record of the trial, including any conviction or sentence, for review and final decision by me or the Secretary of Defense if so designated by me for that purpose." *Id.* (emphasis added).

substantially exceeded his authority, consequently diminishing any separation of powers. Essentially, President Bush has created an institution whereupon the executive branch is the judge, jury, and executioner.

While the *Quirin* court never addressed the procedural requirements by which a military commission must abide, ample evidence exists to support a claim that the procedures currently employed by the Bush Administration are inadequate. The strongest basis for this assumption rests in the fact that the *Quirin* defendants were able to seek judicial review of their detainment and were represented by attorneys.²⁶² It seems paradoxical that the current enemy combatants, Hamdi and Padilla, are held incommunicado and denied access to counsel. Often times it is necessary for the government to detain a person in order to prevent him or her from causing further harm. However, the power of the government to detain an individual has serious implications on that person's individual rights and liberties. To ensure protection of due process, the Bush Administration should strongly consider a response to al Qaeda that preserves jurisdiction within civilian courts.

D. An Extension of New York v. Quarles as an Alternative to the Enemy Combatant Designation

The government claims that the safety of American citizens is at risk, requiring it to use enemy combatant labels on individuals in possession of information concerning future potential terrorist strikes.²⁶³ Because enemy combatants are deprived of several constitutional protections, the government is able to interrogate them for prolonged periods of time, without the presence of an attorney, concerning future potential attacks on America. As seen in the cases of Hamdi and Padilla, the government can detain enemy combatants indefinitely without charging them in order to procure information vital to public safety.²⁶⁴ In addition, the government can use any confessions obtained through these interrogations against an individual in his trial before a military commission.²⁶⁵

If the primary goal of the government during this "war on terrorism" is to gather information vital to protecting the public,²⁶⁶ then the

262. Sonnett, et al., *supra* note 22, at 9.

263. *See supra* note 138.

264. *See supra* notes 190-237 and accompanying text.

265. *See supra* note 158 and accompanying text.

266. A significant amount of evidence supports the argument that gathering intelligence is a primary goal of the government. *See supra* note 24; *see also* News Briefing, Department of

means chosen to reach this goal are too far-reaching. The government can protect the public while at the same time provide all individuals with their fundamental rights. This section highlights a likely reason for the government's fear of using civilian courts for the trial of all suspected terrorists and presents a possible solution that would allow the government to meet its goal without violating the Constitution.

1. *A Fear of Miranda*

The government refuses to try all suspected terrorists in civilian courts because it fears certain individuals will invoke their rights under *Miranda v. Arizona*.²⁶⁷ If brought to trial in a civilian court, an enemy combatant would be given full protection of the Constitution, including the Fifth Amendment's requirement that law enforcement refrain from further interrogation of a suspected criminal when the suspect determines it is in his best interest to remain silent.²⁶⁸ Another restraint on law enforcement's ability to interrogate a criminal suspect is an invocation of his right to counsel.²⁶⁹ Essentially, an individual in custody of the government who invokes his rights under *Miranda* and its progeny cannot be interrogated further. If the government fails to follow this rule, it risks having the statements or

Defense, June 12, 2002, "[O]ur interest really in [Padilla's] case is not law enforcement, it is not punishment because he was a terrorist or working with terrorists. Our interest at the moment is to try and find out everything he knows so that we can stop other terrorist acts." *Id.*

267. 384 U.S. 436 (1966). In *Miranda*, the Supreme Court applied the Fifth Amendment's right against self-incrimination to custodial interrogations (i.e., interrogations where a suspect reasonably believes he is not free to leave), holding that a custodial confession is presumed involuntary, and therefore inadmissible at trial, if a suspect is not first warned by law enforcement that: 1) he has the right to remain silent; 2) any statements he makes can be used against him; 3) he has the right to an attorney; and 4) an attorney will be appointed to him if he cannot afford one. *Id.*

268. When a suspect has invoked his right to silence, the interrogating officer must immediately stop interrogation. *Michigan v. Mosley*, 423 U.S. 96 (1975). The *Mosley* Court determined that a suspect's invocation of his right to silence must be "scrupulously honored" by the interrogating officer. *Id.* The Court declared that it was permissible, however, for an officer to reinitiate questioning at a reasonably later time. *Id.*

269. *Edwards v. Arizona*, 451 U.S. 477 (1981). Edwards was arrested and informed of his *Miranda* rights. *Id.* at 473. Initially, he agreed to be questioned, but in the middle of the interrogation he changed his mind and said he wished to consult an attorney. *Id.* The officers never provided him with counsel. *Id.* at 482. Rather, officers approached Edwards in jail the following day and attempted to reinitiate questioning. Edwards refused to talk, at which time the officers told him he "had to." *Id.* at 479, 482. Unlike the right to silence discussed in *Mosley*, *supra* note 268, the Supreme Court provided a greater protection to Edwards because he had invoked his right to counsel. The Court said that an accused, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused *himself* initiates further communication, exchanges, or conversations with the police." *Id.* at 484-85 (emphasis added).

confessions against that individual suppressed at his or her trial.²⁷⁰ It appears that the government has avoided the use of civilian courts for this reason.

The government might argue that it is not concerned with whether or not a suspected terrorist's statements can be used against him at trial because its chief concern is to prevent *future* attacks. This contention is flawed. An officer who ignores the rights of one suspected terrorist to obtain information in relation to the potential threat of another terrorist might prevent an impending attack, but he or she runs the risk of having key evidence against the former suppressed—the prevention of one might result in the release of the other. Consequently, the government must decide if it will play by the rules to ensure the conviction of one threat, or disregard the rules to gain information necessary to stop another. Rather than make this decision, the government has chosen to place these individuals in military camps where it can question them freely without consequence. There is, however, another option that would allow the government to have its cake and eat it too.

2. A Miranda Exception

The 1984 United States Supreme Court decision of *New York v. Quarles*²⁷¹ provides a much needed solution to the government's enemy combatant dilemma. In *Quarles*, two police officers, Frank Kraft and Sal Scarring, drove to an A & P supermarket in pursuit of Benjamin Quarles after a young woman claimed he raped her.²⁷² While Officer Scarring radioed for assistance, Kraft entered the store and spotted Quarles.²⁷³ Upon seeing Kraft, Quarles ran toward the rear of the store.²⁷⁴ Kraft pursued Quarles, frisked him, and found he was wearing an empty shoulder holster.²⁷⁵ While Quarles was handcuffed

270. This was an issue in the case of John Walker Lindh. M.K.B. Darmer, *Lessons From the Lindh Case: Public Safety and the Fifth Amendment*, 68 BROOK. L. REV. 241 (2002). "The legal case against Lindh was based largely upon admissions he made to interrogators . . . without counsel." *Id.* (citing Defendant's Supplemental Memorandum of Points and Authorities in Support Of Motion to Compel Production of Discovery in Response to Government's March 15, 2002, Notice of Documents Filed in Camera at 1, *United States v. Lindh* (E.D. Va. 2002) (No. 02-37-A)). Ultimately, the *Lindh* case was settled prior to trial, leaving the courts unable to determine whether his statements would have been suppressed. See *supra* notes 175-178 and accompanying text.

271. 467 U.S. 649 (1984).

272. *Id.* at 651. The woman didn't identify Quarles by name, rather she described Quarles as a six-foot-tall black male carrying a gun and wearing a black jacket with the name "Big Ben" printed on the back. *Id.*

273. *Id.* at 652.

274. *Id.*

275. *Id.*

and lying on the floor of the supermarket, and before he was informed of his *Miranda* rights, Kraft asked Quarles where his gun was.²⁷⁶ Quarles nodded in the direction of some empty cartons and stated, "the gun is over there."²⁷⁷ Subsequent to retrieving the gun, Kraft placed Quarles under arrest and read him his *Miranda* rights.²⁷⁸

In the prosecution of Quarles for criminal possession of a weapon, the trial court excluded the admission of the gun and all statements concerning the gun from evidence because Kraft failed to first inform Quarles of his *Miranda* rights.²⁷⁹ The Appellate Division of New York and the New York Court of Appeals affirmed.²⁸⁰ The Supreme Court reversed, finding a public safety exception to the prophylactic rules set forth in *Miranda*.²⁸¹ The Court agreed the ultimate inquiry in determining whether *Miranda* warnings must be given is "whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest."²⁸² The Court also noted that situations arise when an officer's need to protect either himself or another makes adherence to a police manual impossible.²⁸³ The Court described *Miranda v. Arizona* as a cost-benefit analysis,²⁸⁴ where the right against self-incrimination outweighed the need for criminal convictions.²⁸⁵ The Court conducted its own balancing test and concluded, "[T]he need for answers to questions posing a threat to the public safety *outweighs* the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."²⁸⁶ In creating a public safety exception, the Court considered the restraint on time an officer often encounters when detaining dangerous individ-

276. *Quarles*, 467 U.S. at 652. At this point, at least three other officers had arrived and surrounded Quarles when questioned about his gun. *Id.*

277. *Id.*

278. *Id.* After reading *Miranda* rights to Quarles, the officer asked him more questions concerning the gun, such as whether he owned it and where he bought it. *Id.*

279. *Id.* The court found that the detainment of Quarles by the officers and Kraft's question concerning the gun satisfied the requirements for custodial interrogation, thus requiring Kraft to give Quarles his *Miranda* warnings. *Quarles*, 467 U.S. at 653.

280. *Id.*

281. *Id.*

282. *Id.* at 655 (citing *California v. Beheler*, 463 U.S. 1121, 1125 (1983)).

283. *Id.* at 656. The Court stated, "[W]e do not believe that the doctrinal underpinnings of *Miranda* require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety." *Id.*

284. *Quarles*, 467 U.S. at 657. "[W]hen the primary social cost of those added protections is the possibility of fewer convictions, the *Miranda* majority was willing to bear that cost." *Id.*

285. *Id.*

286. *Id.* (emphasis added). The Court declined to place law enforcement officers in the uncomfortable position of determining whether protecting the admissibility of criminal testimony outweighs public safety.

uals.²⁸⁷ However, an officer's need to make a spontaneous decision was not a determinative factor of the public safety exception.²⁸⁸

3. *Extending the Scope of Quarles*

Before presenting an argument in favor of extending the *Quarles* opinion, a brief discussion must be had regarding the current stability of the *Quarles* decision. The public safety exception to *Miranda* set forth in *Quarles* is part of a line of cases designed to limit the efficacy of *Miranda*.²⁸⁹ As the Court noted in *Quarles*, "The rationale in many of these limiting decisions was that the *Miranda* warnings—while 'prophylactic' rules designed to safeguard constitutional rights—are not themselves constitutionally mandated."²⁹⁰ This argument generated strong opposition, especially in Justice Thurgood Marshall's dissenting opinion to *Quarles*.²⁹¹ Eventually, the United States Supreme Court in *Dickerson v. United States*²⁹² discussed the constitutionality of the *Miranda* rules at length, declaring *Miranda* a constitutional decision.²⁹³ While none of the "prophylactic" cases to *Miranda* has been overruled, *Dickerson* has "the potential to undermine the stability of *Quarles* and the rest."²⁹⁴ However, Chief Justice Rehnquist, writing for the majority in *Dickerson*, believed that declaring the *Miranda* decision constitutional is not inconsistent with the prophylactic line of

287. *Id.* at 656. "Where spontaneity rather than adherence to a police manual is necessarily the order of the day, the application of the exception which we recognize today should not be made to depend on . . . the subjective motivation of the arresting officer." *Id.*

288. *Id.* at 657. The Court stated, "We decline to place officers . . . in the untenable position of having to consider, *often* in a matter of seconds, whether it best serves society for them to ask necessary questions without *Miranda* warnings and render whatever probative evidence they uncover inadmissible." *Quarles*, 467 U.S. at 657. (emphasis added). The term "often" implies that an imminent threat to public safety may trigger the public safety exception, but other factors, such as threats of a catastrophic nature that are likely to occur in the near (but not immediate) future, may also trigger the use of this exception.

289. Darmer, *supra* note 270, at 264.

290. *Quarles*, 467 U.S. at 684 (Marshall, J., dissenting).

291. Justice Thurgood Marshall stated:

In fashioning its 'public-safety' exception to *Miranda*, the majority makes no attempt to deal with the constitutional presumption established by that case *Miranda* was not a decision about public safety; it was a decision about coerced confessions. Without establishing that interrogations concerning the public's safety are less likely to be coercive than other interrogations, the majority cannot endorse the 'public-safety' exception and remain faithful to the logic of *Miranda* . . .

Id.

292. 530 U.S. 428 (2000).

293. Darmer, *supra* note 270, at 268.

294. *Id.*

cases.²⁹⁵ Further support for the continued vitality of the *Quarles* decision—in light of *Dickerson*—is found in lower federal courts.²⁹⁶

The Supreme Court has not addressed the scope of the public safety exception since its decision of *Quarles* in 1984.²⁹⁷ Because the Court's determination in *Quarles* focused on an *imminent* threat to public safety,²⁹⁸ one can only speculate what other circumstances would weigh in favor of a public safety exception. The situation tormenting the Bush Administration—a suspected terrorist possessing information pertinent to the prevention of future terrorist attacks—is best illustrated by the *magnitude* of the threat rather than by its *immediacy*. While the *Quarles* Court did not discuss how the magnitude of a public threat would influence its decision, it is farfetched to argue that a bomb going off in a crowded building is less of a public safety concern than a hidden gun, simply because the bomb might not detonate for twenty-four hours. While the future of *Quarles* is uncertain, there is no better time to test its vitality than in the wake of a domestic terrorist attack.²⁹⁹ To accomplish this objective, the government should arrest and charge American citizens suspected of being terrorists under federal statutes³⁰⁰ and argue for a good faith extension of *Quarles*, rather than place them in military camps.

IV. IMPACT

The American public is in the midst of war with a faceless enemy. The threat of terrorism has extended to our backyards, our workplaces, and our homes. We are scared. We want protection. We demand it. Our government has not only the right, but also the duty to defend us—to protect our right to life. However, the technique currently employed by the government carries dangers of its own. The designation of enemy combatants might have a negative impact on the legitimacy of the Bush Administration. The judiciary is likely to reject any contention that Bush's conduct is lawful in light of his arbitrary use of the enemy combatant label and the constitutional restrictions

295. *Dickerson*, 530 U.S. at 441. The court viewed the prophylactic cases as “illustrat[ing] the principle—not that *Miranda* is not a constitutional rule—but that no constitutional rule is immutable.” *Id.*

296. In *United States v. Jones*, 154 F. Supp. 2d 617 (S.D.N.Y. 2001), the Southern District of New York found “no suggestion in *Dickerson* that *Quarles* and other exceptions to *Miranda* have been overruled.” *Id.* at 623 n.7.

297. See Darmer, *supra* note 270, at 271.

298. See *supra* note 287 and accompanying text.

299. For a more extensive discussion on the future of *Quarles* in light of the *Dickerson* decision, see generally Darmer, *supra* note 270.

300. This action would be similar to actions taken against Lindh, Moussaoui, and others. See *supra* notes 167-201, 251-252 and accompanying text.

placed on its victims.³⁰¹ Therefore, President Bush must limit the scope of his enemy combatant definition or find some alternate way of protecting our lives while simultaneously protecting our liberties. If he fails to do so, the legitimacy of his administration could be injured.

Our nation's laws are founded on a set of predetermined neutral principles. The credibility of our government depends on its adherence to these predetermined principles, especially during turbulent times.³⁰² Successful compliance with this concept results in easily predictable legal consequences to any given action, regardless of the actor.³⁰³ This "rule of law" facilitates public satisfaction with government, allowing the government to prosper and grow. Alternatively, a lack of compliance with these principles not only removes predictability, but it risks discrediting the legitimacy of the entire system.³⁰⁴ The governed depend on the neutral characteristics of the governing. If the perception of neutrality is lost, so is the governing body's respect and authority. This concept of legitimacy, discussed in depth by Isaac Balbus,³⁰⁵ places a restraint on the political body of the government, such that "legal rationality and predictability . . . require that the legal system be insulated from the immediate political conflicts of the day and the shifting substantive goals of any particular set of political actors."³⁰⁶

In dealing with the threat of future terrorist attacks, President Bush must consider the potential impact of his actions on the legitimacy of his administration. Enemy combatant designations might save many lives by frustrating the plans of hostile enemies, but this process ignores previously established procedures designed to serve the same

301. See *supra* note 297.

302. See ISAAC D. BALBUS, *THE DIALECTICS OF LEGAL REPRESSION: BLACK REBELS BEFORE THE AMERICAN CRIMINAL COURTS*, ch. 1 (Russell Sage Found. Pub. 1973). In his book, Balbus addresses the question, "how can [a state] reconcile [its] immediate interest [of ending violence] in order with [its] long-run interest in maximizing [its] legitimacy?" In response, Balbus contends, "[L]egitimacy in the liberal state resides in the rule of law as an autonomous body of norms and procedures to which even the sovereign is subject, a legitimacy interest not easily reconciled with the short-run interest in ending violence as quickly as possible." *Id.*

303. Quoting Weber, Balbus says:

The modern capitalist concern is based inwardly above all on *calculation*. It requires for its survival a system of justice whose workings can be *rationally calculated*, at least in principle, according to fixed general laws, just as the probable performance of a *machine* can be calculated Thus, it guarantees to individuals and groups within the system a relative maximization of freedom, and greatly increases for them the possibility of predicting the legal consequences of the actions

Id. at 4.

304. *Id.*

305. See *supra* note 302.

306. BALBUS, *supra* note 302, at 4-5.

purpose. It can be argued that when two possible means exist that ultimately lead to the same end, both are equally acceptable. However, when one process adheres to predetermined principles of equality and fairness and the other expressly departs from such, the former will remain consistent with society's perceptions of the system, while the latter will foster distrust. The procedures President Bush ignored—criminal procedures in civilian courts and wartime procedures for the treatment of prisoners of war—adequately discipline society's outlaws in a manner consistent with predetermined American principles.³⁰⁷ President Bush's continued designation of enemy combatants arbitrarily ignores these principles. President Bush's line between criminal and combatant is hazy, making it conceivable that one person will be tried under the full protection of American justice while another person will be tried under a completely different system for essentially the same crime. Eventually, Padilla or Hamdi will have an opportunity to argue against their detainment before the United States Supreme Court.³⁰⁸ It is unlikely the Court will support President Bush's interpretation of *Quirin* or *Milligan*. While both cases allow for the detainment and trial of American citizens before military commissions, President Bush's administration disregarded specific limitations placed on the commissions by these cases; specifically, it failed to follow *Quirin*'s definition of enemy combatant, and it created excessive procedures for trial by these commissions.³⁰⁹ These two fundamental flaws will ultimately lead the Supreme Court to rule that President Bush's interpretation of *Quirin*, while congressionally authorized and constitutional on its face, expands his power to the point where it is immune from review by any other governmental branch. In light of such findings, President Bush's administration must confine its use of the enemy combatant designation to that set forth in *Quirin* or rely on a different method for the purpose of obtaining information vital to the public's safety.

The Bush Administration would benefit greatly from a *Quarles* extension. Based on the circumstances surrounding the war on terrorism, it is likely that the Supreme Court would extend the public safety exception to allow for extended interrogation of suspected terrorists. The Supreme Court determined that Benjamin Quarles's missing gun

307. These "predetermined American principles" include the fundamental rights provided by the Constitution—the rights discussed throughout the course of this Comment, such as judicial review, due process, and representation by counsel.

308. In fact, during the publication of this Comment, the United States Supreme Court granted certiorari to both Hamdi and Padilla. Both cases are scheduled to be heard on Wednesday, April 28, 2004. See *supra* notes 212 and 238.

309. See *supra* notes 146-161 and 240-250 and accompanying text.

created an imminent threat to the safety of the police officers and individuals near the crime scene. While there exists a great deal of debate as to whether the circumstances surrounding Quarles's arrest truly posed a safety threat,³¹⁰ it is unquestionable that a ticking time bomb would create such a scenario.

Our country is facing its largest threat in sixty years. In support of a *Quarles* extension, the United States Court of Appeals for the Second Circuit explicitly approved the use of a public safety exception in a case involving a terrorist plot.³¹¹ In *United States v. Khalil*, police officers thwarted an attempt by two men to detonate pipe bombs held within their apartment.³¹² While Abu Mezer, one of the defendants, was in the hospital,³¹³ the police questioned him as to the number of bombs and their locations, without Mirandizing him.³¹⁴ The district court found that the facts surrounding the incident justified using the public safety exception.³¹⁵ The Second Circuit affirmed the lower court's ruling through an expansive reading of the *Quarles* opinion.³¹⁶ For this reason, it seems likely that the Supreme Court would allow for an expanded reading of *Quarles* to protect the actions of law enforcement officers attempting to ferret out potential terrorist activity. With an expansion of *Quarles*, the Bush Administration could lawfully avoid *Miranda* while questioning suspected terrorists. Law enforcement officials could lawfully deny an individual the right to confer with an attorney, interrogate him about other terrorist plots and not worry that statements made by him during the interrogation will be suppressed at his trial thereby resulting in his release. This appears to be the most favorable method for the simultaneous conviction of terrorists and prevention of terror.

310. The incident occurred at 12:30 a.m. when the convenient store was fairly empty. *New York v. Quarles*, 467 U.S. 649, 652 (1984). In addition, three other police officers arrived on the scene to assist officers Kraft and Scarring. *Id.* at 653.

311. See *United States v. Khalil*, 214 F.3d 111 (2d Cir. 2000).

312. *Id.* at 115.

313. Both defendants were shot and wounded by the police when the police raided their apartment. Darmer, *supra* note 270, at 272.

314. *Id.*

315. *Id.*

316. *Id.* at 273. In fact, Mezer only appealed the introduction of a statement he made in response to the question of whether he intended to kill himself in the explosion. *Id.* In response to the question, Mezer responded, "Poof." *Id.* The Second Circuit, in upholding the district court's use of the public safety exception for the inquiry, disagreed with Mezer, "given that Abu Mezer's vision as to whether or not he would survive his attempt to detonate the bomb had the potential for shedding light on the bomb's stability." Darmer, *supra* note 270, at 273 (quoting *Khalil*, 214 F.3d at 121) (internal quotation marks omitted). Darmer has pointed out, "If a statement can be admissible under *Quarles* on this basis alone, it augurs the potential for a significant expansion of the public safety exception." *Id.*

The government must be cautious in continuing to implement its designation of enemy combatants. When America is faced with crisis, a "great deal of deference is given to the executive branch. But when the president grabs power, it typically stays around until a period of calm when Congress and the courts pull the president back in line."³¹⁷ History has shown our government often responds to threats with good intentions only to apologize for its overreaction years later. It happened with slavery; it happened with *Koromatsu*; and it is likely to happen again today.

V. CONCLUSION

When a nation is threatened by an imminent attack on its citizens, a natural reaction is to defend itself by any means necessary. However, this response is quickly recognized as a dangerous overreaction not to be practiced in a society such as ours. Our government must find another way to protect our fundamental rights than by arbitrarily removing them from an unpopular minority of its citizens. Too often has our government failed to do this; too late do we, as a society, come to realize this. The hostile acts of al Qaeda must not go unpunished. However, our government needs to understand fully the consequences of its actions before "jumping the gun." The indefinite detainment of any American citizen incommunicado is immediately suspect. A decision by the president to try an individual in a commission created by the president and with final review by only the president is equally suspect. In all likelihood, the Supreme Court will rule such a method unconstitutional.

Hope still exists, however, in our struggle to win this war on terrorism. Place these men in civilian courthouses. Allow them appellate review. Disarm the President of unlimited power. The potential danger of international terrorism on our country and the relentless character of the enemy creates a public safety exception to the restrictions traditionally placed on law enforcement. Use it! Use it well and we may be able to both stop a bomb and convict a bomber. Ignore it and this war may never end.

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317. Michael Hill, *Ashcroft's Agenda; Critics of the Attorney General Wonder If the Taking Away of Civil Liberties Goes Beyond Countering Terrorism*, BALT. SUN, Feb. 16, 2003, at 1C.

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